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Current Illegitimacy of International Human Rights Litigation

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Current Illegitimacy of International Human Rights Litigation

Cover Page Footnote

Associate Professor, University of Colorado School of Law. Associate Professor, University of Chicago Law School. We would like to thank Kathryn Bradley, David Fidler, Hiroshi Motomura, Bob Nagel, Steve Smith, Cass Sunstein, Art Travers, Andrew Vollmer, Arthur Weisburd, and John Yoo for their helpful comments and suggestions. We would also like to thank Sarah Good for her excellent research assistance. Professor Goldsmith thanks the Arnold and Frieda Shure Research Fund for support.

THE CURRENT ILLEGITIMACY OF INTERNATIONAL HUMAN RIGHTS LITIGATION

Curtis A. Bradley*
Jack L. Goldsmith, III**

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INTRODUCTION

A central tenet of American foreign relations law is that customary international law ("CIL") has the domestic legal status of federal common law. In a recent article, we labeled this view the "modern position."¹ We argued that the modern position rose to orthodoxy only recently and that it is inconsistent with basic understandings regarding American representative democracy, federal common law, separation of powers, and federalism. We concluded that courts should not apply CIL as federal law unless authorized to do so by the federal political branches.

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1. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 816 (1997).

The principal significance of the modern position concerns the legitimacy of international human rights litigation in U.S. courts.² In recent years, U.S. courts have been faced with a growing number of cases involving alleged human rights abuses in foreign countries.³ The authority of U.S. courts to hear and provide relief in such cases has largely been premised on the validity of the modern position. Nevertheless, there may be theories other than the modern position that would support such litigation.⁴ Our earlier work only briefly touched on these alternate theories; we consider them more fully here. We also respond to criticisms of our earlier work made in this issue by fellow panelists Gerald Neuman, Beth Stephens, and Ryan Goodman and Derek Jinks.⁵

This Article proceeds in three parts. Part I briefly summarizes our thesis and explains why the legitimacy of human rights litigation is what is really at stake in debates over the modern position. Part II responds to criticisms of certain of our historical and constitutional claims. Part III considers whether the judicial treatment of international human rights law as federal law can plausibly be justified, independent of the modern position, by the Alien Tort Statute and the Torture Victim Protection Act. We conclude that it cannot. The federal political branches can authorize international human rights litigation if they wish. But with narrow exceptions, they have not done so thus far. Until they do, international human rights litigation rests on a tenuous legal foundation.

I. A CRITIQUE OF THE MODERN POSITION

A. Summary

The two principal sources of public international law are treaties and CIL. Treaties are express agreements among nations.⁶ CIL is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation."⁷ Both forms of international law impose binding obligations on nations on the international plane. International law, how-

2. See *id.* at 818-19, 821, 832-34, 869-70.

3. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996); *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

4. See Bradley & Goldsmith, *supra* note 1, at 872-73.

5. See Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L. Rev. 393 (1997) [hereinafter Stephens, *The Law of Our Land*]; Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463 (1997).

6. See Restatement (Third) of the Foreign Relations Law of the United States, pt. I, introductory note, at 18 (1987) [hereinafter Restatement (Third)].

7. Restatement (Third), *supra* note 6, § 102(2), at 24.

ever, does not itself specify how nations must treat these obligations as a matter of domestic law.⁸ Instead, the domestic legal status of international law is determined by each nation's domestic law.

The U.S. Constitution states in Article VI that treaties are part of the "supreme Law of the Land,"⁹ and in Article III that cases arising under treaties fall within the judicial power of the federal courts.¹⁰ By contrast, neither of these articles mentions CIL, which at the time of the founding was referred to as part of the "law of nations."¹¹ Moreover, as Professor Henkin has noted, the language of the Supremacy Clause "does not easily include [customary] international law."¹² The Constitution's only express reference to CIL is in Article I, which provides that Congress has the power to "define and punish . . . [o]ffenses against the Law of Nations."¹³

Despite this contrast between the Constitution's treatment of treaties and its treatment of CIL, proponents of the modern position argue that CIL, like treaties, has the status of federal law. It has this status, the argument goes, by virtue of the common law powers of the federal courts. Under this view, U.S. courts are to apply CIL as federal law even in the absence of authorization by the federal political branches.¹⁴

8. See Louis Henkin et al., *International Law: Cases and Materials* 153 (3d ed. 1993) [hereinafter Henkin, *International Law*]. Accordingly, nations "differ as to whether international law is incorporated into domestic law and . . . whether the executive or the courts will give effect to norms of international law or to treaty provisions in the absence of their implementation by domestic legislation." *Id.*

9. See U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .").

10. See U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .").

11. See Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 26-27 (1952); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 821-22 (1989) [hereinafter Jay, *The Status of the Law of Nations*].

12. Louis Henkin, *Foreign Affairs and the United States Constitution* 508 n.16 (2d ed. 1996) [hereinafter Henkin, *Foreign Affairs*]. The Supremacy Clause defines supreme federal law to include the Constitution, treaties, and "the Laws of the United States which shall be made in Pursuance" of the Constitution. U.S. Const. art. VI, § 2 (emphasis added). CIL is not the Constitution or a treaty, and it is not made pursuant to U.S. constitutional processes; rather, it is made by the world community "in a process to which the United States contributes only in an uncertain way and to an indeterminate degree." Henkin, *Foreign Affairs, supra*, at 508 n.16.

13. U.S. Const. art. I, § 8, cl. 10.

14. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) ("[I]nternational law has an existence in the federal courts independent of acts of Congress."); *United States v. Buck*, 690 F. Supp. 1291, 1297 (S.D.N.Y. 1988) ("International law exists in the federal courts independent of acts of Congress . . ."); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1561 (1984) [hereinafter Henkin, *International Law as Law*] ("International law . . . is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.").

At this level of generality, numerous courts and commentators in recent years have endorsed the modern position.¹⁵ Courts, however, have generally endorsed it only in connection with their consideration of whether CIL is part of the "Laws of the United States" for purposes of Article III "arising under" jurisdiction, and related jurisdictional questions.¹⁶ Commentators, on the other hand, have more broadly considered the consequences that the modern position might have for domestic lawmaking institutions and other forms of domestic law.¹⁷ Many commentators plausibly argue that if CIL is federal common law, it preempts inconsistent state law pursuant to the Supremacy Clause.¹⁸ Others plausibly argue that if the modern position is correct, then judicial interpretations of CIL bind the President under the "Take Care" Clause of Article II of the Constitution.¹⁹ Some propo-

15. See Bradley & Goldsmith, *supra* note 1, at 817 nn.3-4, 837 nn.150-51 (collecting numerous sources which support this view of CIL).

16. See, e.g., *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 501-03 (9th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-89 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193-94 (D. Mass. 1995).

17. Neuman dismisses many of these consequences as "speculative variants on the modern position offered by particular scholars." Neuman, *supra* note 5, at 380-81. We acquiesce in Neuman's efforts to de-legitimize some of the broader consequences of the modern position, which have been advocated by Professors Glennon, Henkin, Lobel, Paust, and others. His claim, however, that our description of these broader consequences involves "errors of commission and omission" because not all proponents of the modern position subscribe to such consequences, see Neuman, *supra* note 5, at 380, is off the mark. We made clear in our earlier work that there was no canonical account of the basis for or consequences of the modern position, see Bradley & Goldsmith, *supra* note 1, at 816 n.2; we emphasized that the implications of the modern position "are being developed (and urged on courts) primarily by scholars," *id.* at 838; and we were careful to flag instances in which scholars disagreed about these implications, see *id.* at 844 (noting that "[n]ot all supporters of the modern position agree with Professor Henkin" that CIL trumps prior inconsistent federal statutes), and *id.* at 845 (noting that the view that CIL binds the President is "far from universally accepted"). Because we lack Neuman's ability to discern which commentators are "mainstream" and which are not, see Neuman, *supra* note 5, at 381, our goal was simply to show that *all* of the potential consequences of the modern position for domestic lawmaking—whatever their other demerits—depend on the view that CIL is federal law. See Bradley & Goldsmith, *supra* note 1, at 844, 846. Neuman's confidence in a relatively narrow variant of the modern position, and his dismissal of other variants, is therefore best addressed to supporters of the modern position, not to us.

18. See, e.g., Restatement (Third), *supra* note 6, §§ 111(1), 115 cmt. e; Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 Sup. Ct. Rev. 295, 303; Henkin, *International Law as Law*, *supra* note 14, at 1561.

19. See, e.g., Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. Rev. 321, 348-58 (1985) [hereinafter Glennon, *Raising The Paquete Habana*]; Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1116-20 (1985); Jordan J. Paust, *The President Is Bound by Customary International Law*, 81 Am. J. Int'l L. 377, 382 (1987) [hereinafter Paust, *The President Is Bound*]; cf. Frederic L. Kirgis, Jr., *Federal Statutes, Executive Orders and "Self-Executing Custom"*, 81 Am. J. Int'l L. 371, 374-75 (1987) (concluding that the Executive has the power to violate CIL only in certain circumstances); Louis

nents of the modern position even argue that CIL supersedes inconsistent federal legislation.²⁰

Our critique of the modern position began with history. Many courts and commentators rest their support for the modern position on nineteenth and early twentieth century judicial decisions that referred to CIL—or the “law of nations”—as “part of our law” or the “law of the land.”²¹ The court in the seminal *Filartiga* decision, for example, cited these decisions for the proposition that CIL “has always been part of the federal common law.”²² These decisions did not, however, apply CIL as *federal* law. Rather, they applied it as part of the “general common law” famously associated with *Swift v. Tyson*.²³ Courts applied general common law as a default in the absence of any particular domestic authorization unless and until state or federal legislation specified otherwise.²⁴ Unlike modern federal common law, general common law did not have the status of federal law.²⁵ As a result, CIL, as a form of general common law, did not bind the states

Henkin, *The President and International Law*, 80 Am. J. Int'l L. 930, 935-36 (1986) [hereinafter Henkin, *The President*] (same).

20. Professor Henkin has argued that CIL supersedes prior, but not subsequent, inconsistent federal legislation. See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 875 (1987) [hereinafter Henkin, *The Constitution and United States Sovereignty*]. Professor Paust has gone further, arguing that some CIL rules have the status of U.S. constitutional law, and therefore supersede even subsequent federal legislation. See Jordan J. Paust, *International Law as Law of the United States* 5-6, 95, 338-43 (1996) [hereinafter Paust, *International Law*]. Another possible role for international law is in the *interpretation* of federal enactments. For a discussion of that role, see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. — (forthcoming) [hereinafter Bradley, *The Charming Betsy Canon*].

21. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“part of our law”); *The Nereide*, 13 U.S. 388, 423 (1815) (“law of the land”); see generally Bradley & Goldsmith, *supra* note 1, at 849 nn.217, 218 (listing courts and commentators relying on these precedents).

22. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

23. 41 U.S. 1 (1842). For evidence that CIL was treated as general common law in the nineteenth century, see Bradley & Goldsmith, *supra* note 1, at 822-26; see also Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After Erie*, 25 Denv. J. Int'l L. & Pol'y — (forthcoming) [hereinafter Bradley, *The Status of Customary International Law*] (citing additional authority). We use the term “general common law” to refer to the body of non-federal common law applied independently by state and federal courts before *Erie*. This law was sometimes referred to by courts as the “common law” or the “general law.” See Bradley, *The Status of Customary International Law*, *supra*.

24. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1276-87 (1996); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1515, 1517-21 (1984); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1263-79 (1985) [hereinafter Jay, *The Origins*]; Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 Harv. L. Rev. 1785, 1790-92 (1997).

25. See Fletcher, *supra* note 24, at 1524-27.

under the Supremacy Clause,²⁶ did not bind the President under the Take Care Clause,²⁷ and did not establish a basis for federal question jurisdiction.²⁸

At least until the time of *Erie Railroad v. Tompkins*,²⁹ then, CIL was viewed as non-federal general common law in the absence of its incorporation into federal law by the political branches. The Court in *Erie* overruled *Swift*, announced that "[t]here is no federal general common law," and held that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."³⁰ As we now know, *Erie* paved the way for a new and genuinely federal common law.³¹ To be consistent with the requirements of *Erie*, however, this new federal common law must be authorized in some fashion by the U.S. Constitution or a federal statute.³² Such authorization is what gives the new federal common law its status as supreme federal law.³³

26. See, e.g., Charles Pergler, *Judicial Interpretation of International Law in the United States* 19 (1928) (noting in 1928 that if a state statute "violates an established principle of international law . . . clearly there would be only one course open to the courts, viz., to enforce the state statute, always assuming its constitutionality and that it does not contravene any valid federal enactment, or any treaty"); Quincy Wright, *The Control of American Foreign Relations* 161 (1922) (noting in 1922 that a "state constitution or legislative provision in violation of customary international law is valid unless in conflict with a Federal constitutional provision or an act of Congress").

27. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that courts are to apply CIL "where there is no treaty, and no controlling executive or legislative act or judicial decision").

28. With regard to federal question jurisdiction under Article III, see *American Ins. Co. v. Canter*, 26 U.S. 511, 545-46 (1828) (holding that a case involving application of the "law, admiralty and maritime"—elements of the law of nations—does "not in fact, arise under the Constitution or Laws of the United States" within the meaning of Article III). With regard to statutory federal question jurisdiction, see *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (holding that "laws . . . of the United States" in Section 25 of Judiciary Act of 1789 does not include the law of nations); *City and County of San Francisco v. Scott*, 111 U.S. 768, 769 (1884) (same); and *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875) (same).

29. 304 U.S. 64 (1938).

30. *Id.* at 78.

31. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405-07 (1964). Stephens is right that there were pre-*Erie* precursors to a genuinely federal common law, but she is mistaken in suggesting that these pre-*Erie* precedents treated customary international law as federal law. See *infra* pp. 333-34.

32. See Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883, 895-96 (1986); Friendly, *supra* note 31, at 407, 421; Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 Pace L. Rev. 263, 287 (1992); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 17 (1985); Henry P. Monaghan, *Hart and Wechsler's The Federal Courts and the Federal System*, 87 Harv. L. Rev. 889, 892 (1974) (book review); George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 Const. Commentary 285, 294 (1993). But see Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805, 813 (1989) ("Courts must act, of course, within their constitutional and statutory jurisdiction. But no other 'authorization' is required.").

33. See Friendly, *supra* note 31, at 407.

Nothing on the face of the Constitution or any federal statute appears to authorize the modern position's envisioned wholesale application of CIL by the federal judiciary. As noted above, Article I authorizes Congress to define and punish offenses against the law of nations.³⁴ Congress has exercised this and related powers to incorporate select CIL principles into federal statutes,³⁵ but it has never purported to incorporate all of CIL into federal law. And Congress's selective incorporation would be largely superfluous if CIL were already incorporated wholesale into federal common law.

Some commentators have argued that the authorization for the modern position comes not from the text but rather from the structure of the Constitution. They contend that the interpretation and application of CIL falls within the exclusive foreign affairs powers of the federal government and that it is therefore a proper subject for federal common-lawmaking by the federal courts. In support of this argument, they rely heavily on the Supreme Court's *Sabbatino* decision.³⁶ In our prior work, we argued that, contrary to popular lore, *Sabbatino* did not hold that CIL was federal law.³⁷ We further argued that the federal common law of foreign relations to which *Sabbatino* gave rise offers no support for the separation of powers claims of the modern position and, at best, only weak support for the federalism claims.³⁸ Finally, we argued that, independent of *Sabbatino*, the modern position's federalism claims are in substantial tension with the Supreme Court's modern federalism jurisprudence, as well as with various actions by the federal political branches.³⁹

B. What is at Stake

Those uninitiated to the modern position debate might assume that the debate concerns what has traditionally been thought of as *international law*; that is, the law regulating the relations among nations. This was in fact the focus of pre-World War II CIL, which regulated, for example, the treatment of diplomats and the use of military force. This traditional CIL was "authentically customary law—norms that have in fact resulted from practice."⁴⁰ The state practice requirement for the existence of CIL was satisfied by a general, uniform, and usually longstanding practice.⁴¹ The other requirement for the existence of CIL—the subjective "sense of legal obligation" or *opinio juris*—was largely induced by examining the general practice.

34. See *supra* note 13.

35. See Henkin, *Foreign Affairs*, *supra* note 12, at 508 n.16 (citing examples).

36. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

37. See Bradley & Goldsmith, *supra* note 1, at 859-60.

38. *Id.* at 860-67.

39. *Id.* at 867-70.

40. Louis Henkin, *International Law: Politics and Values* 33 (1995) [hereinafter Henkin, *Politics and Values*].

41. *Id.*

For several reasons, the modern position debate does *not* primarily concern this traditional CIL. First, the modern position debate concerns the status of CIL in U.S. courts, whereas much of traditional CIL is only relevant to international diplomatic relations and never arises in domestic litigation.⁴² Second, much of the traditional CIL that was applied by courts as general common law in the nineteenth and early twentieth centuries is no longer relevant to domestic litigation.⁴³ Third, and perhaps most importantly, the federal political branches have rendered much of the traditional CIL irrelevant for domestic purposes because they have federalized this law by treaty or statute.⁴⁴ These reasons help explain why the issue of the domestic legal status of CIL rarely came up in the decades after *Erie*.⁴⁵ They also explain why the enormous post-1980 literature on the domestic status of CIL rarely if ever speaks to traditional CIL. It may still be possible for an occasional issue of uncodified traditional CIL to arise in domestic litigation. These situations will be rare, however, and they are not the focus of the modern position debate.⁴⁶

42. See Restatement (Third), *supra* note 6, § 111 cmt. c ("Much customary law and many international agreements . . . do not have the quality of law for the courts in that they do not regulate activities, relations, or interests in the United States."); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 670 (1986) [hereinafter Trimble, *A Revisionist View*] ("In practice, customary international law is applied primarily by the political branches, not the judiciary.").

43. For example, the CIL governing prize law, which was frequently applied by courts in the nineteenth century, had largely disappeared by 1948. See David Bederman, *The Feigned Demise of Prize*, 9 Emory Int'l L. Rev. 31, 36-41 (1995) (book review) (providing various reasons for this phenomenon, such as the fact that the United States has not been in a declared war since 1945, and the legal predicate to prize law is that the capture occur during war). Similarly, the law of piracy played a prominent role in U.S. courts in the nineteenth century but plays a relatively small role today. See Alfred P. Rubin, *The Law of Piracy* 298, 337-46 (U.S. Naval War College International Law Studies, vol. 63, 1988).

44. Thus, for example, foreign sovereign immunity is now the subject of a comprehensive federal statute, the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1994), and diplomatic immunity is the subject of treaties to which the United States is a party. See, e.g., Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

45. The single post-*Erie*, pre-*Sabbatino* decision to squarely address the domestic legal status of CIL is *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948). In *Bergman*, the court sitting in diversity considered whether an ambassador in transit to another country was entitled under CIL to immunity from service of process. Writing for the court, Judge Learned Hand explained that "[the New York state courts'] interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves." *Id.* at 361. After analyzing three New York decisions and a variety of international sources, Hand concluded that "the courts of New York would today hold" that an ambassador in transit is immune under CIL from service of process in New York. *Id.* at 363. He added the caveat, however, that "[w]hether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here." *Id.* at 361. Today this issue of diplomatic immunity would be governed by treaty.

46. See *infra* part II for further discussion of this point.

The focus of the modern position debate is rather on what we have called the "new CIL."⁴⁷ This new CIL can best be understood against the backdrop of the larger transformation of international law generally in the post-World War II period. Since the War, international law has developed to regulate to some extent the ways in which nations treat their citizens.⁴⁸ The principal sources of this change have been a series of multilateral human rights treaties⁴⁹ and several non-binding United Nations General Assembly Resolutions, most notably the Universal Declaration of Human Rights.⁵⁰ Although the United States

47. See Bradley & Goldsmith, *supra* note 1, at 838-42; cf. Henkin, *Politics and Values*, *supra* note 40, at 33-39 (distinguishing, among other things, between "established customary law" and "contemporary customary law"); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *Austl. Y.B. Int'l L.* 82, 89-90 (1992) (distinguishing between "the old-style of practice-based custom, *la coutume sage*" and "*la coutume sauvage*: a product grown in the hot house of parliamentary diplomacy and all too often sold as customary before having stood the test of time" (footnote omitted)).

48. See Mark Janis, *An Introduction to International Law* 247-48 (2d ed. 1993); David Luban, *The Legacies of Nuremberg*, 54 *Soc. Research* 779, 780-81 (1987); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 *Am. U. L. Rev.* 1, 9-10 (1982). On the pre-World War II antecedents to international human rights law, see Henkin, *Politics and Values*, *supra* note 40, at 169-73.

49. Among the most prominent agreements, in chronological order, are the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly Dec. 9, 1948, 102 *Stat.* 3045, 78 *U.N.T.S.* 277; the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, S. Exec. Doc. C, 95-2, at 1 (1978), 660 *U.N.T.S.* 195; the International Covenant on Economic, Social and Cultural Rights, adopted by the U.N. General Assembly Dec. 16, 1966, S. Exec. Doc. D, 95-2, at 1 (1978), 993 *U.N.T.S.* 3; the International Covenant on Civil and Political Rights, adopted by the U.N. General Assembly Dec. 19, 1966, S. Exec. Doc. E, 95-2, at 1 (1978), 999 *U.N.T.S.* 171; the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the U.N. General Assembly Dec. 18, 1979, 1249 *U.N.T.S.* 13, 19 *I.L.M.* 33; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. Treaty Doc. No. 100-20 (1988), 23 *I.L.M.* 1027, as modified, 24 *I.L.M.* 535; and the Convention on the Rights of the Child, adopted by the U.N. General Assembly Nov. 20, 1989, 28 *I.L.M.* 1448.

50. G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). Other prominent resolutions include the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the Declaration on the Rights of the Child, both of which were eventually succeeded by multilateral conventions. Human rights resolutions that have not yet been succeeded by treaties include the Declaration on the Rights of Mentally Retarded Persons; the Declaration on the Rights of Disabled Persons; the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief; the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live; the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care; and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities. See Richard B. Lillich & Hurst Hannum, *International Human Rights: Problems of Law, Policy, and Practice* 322-23 (3d ed.

has voted in favor of most—but not all—of the resolutions, it has declined to ratify many of the treaties. Moreover, for the ones that it has ratified, it has generally insisted, through a series of reservations, understandings, and declarations (“RUDs”), that the treaties not apply as domestic law and thus not preempt inconsistent state law.⁵¹ As Professor Spiro explains, “[T]he Senate has consistently refused to effect any changes in state laws by way of human rights treaties.”⁵²

Through a little-understood and greatly under-analyzed process, however, these treaties and resolutions are today understood to be the sources of an independent CIL of human rights. There is much debate about how this new CIL is made and identified.⁵³ One thing, however, is clear: This new CIL does *not* reflect the actual practice of states. If the traditional state practice requirement were still a necessary prerequisite to the development of a CIL norm, there would be very little customary international human rights law, for “it is still customary for a depressingly large number of States to trample upon the human rights of their nationals.”⁵⁴ The change in the way CIL is created, from the “accretion of practices” to a more “purposive creation of custom” through treaties and United Nations resolutions, marks a “radical innovation, and indeed reflects a radical conception.”⁵⁵

1995); Human Rights in the World Community: Issues and Actions 53 (Richard Pierre Claude & Burns H. Weston eds., 1989).

51. Thus, to take the example of the International Covenant on Civil and Political Rights, the non-self-executing declaration “clarif[ies] that the Covenant will not create a private cause of action in U.S. courts.” Committee on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, at 19 (1992). The federalism understanding “serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to ‘federalize’ matters now within the competence of the States.” *Id.* at 18. Specific reservations and other conditions that preserve differences between United States law and the requirements of the Covenant ensure that “changes in U.S. law in these areas will occur through the normal legislative process.” *Id.* at 4. The RUDs for the Covenant on Civil and Political Rights are typical of the RUDs attached as conditions to ratification of the other human rights treaties. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int’l L. 341 (1995) [hereinafter Henkin, *U.S. Ratification*].

52. Peter J. Spiro, *The States and International Human Rights*, 66 Fordham L. Rev. 567, 574 (1997).

53. See, e.g., Henkin, *Politics and Values*, *supra* note 40, at 37-39; Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* 342-421 (1989); David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 German Y.B. Int’l L. 198, 216-31 (1996).

54. Simma & Alston, *supra* note 47, at 90.

55. Henkin, *Politics and Values*, *supra* note 40, at 37. Professor Henkin continues: “Whereas law was *made* by treaty but *grew* by custom, now there is some tendency to treat custom as a means, alternative to treaty-making, for deliberate legislation. Using the concept of custom for that purpose brings with it the traditional definition, but now practice sometimes means activity designed to create the norm rather than to reflect it.” *Id.* For commentary questioning the legitimacy of this transformation, see, e.g., Simma & Alston, *supra* note 47, at 91-100; J.S. Watson, *Legal Theory, Efficacy*

Our focus is not on the precise content of this new CIL or its legitimacy on the international plane.⁵⁶ Rather, our focus is on the proper status of this new CIL, whatever its content and international legitimacy, in the U.S. legal system. But there are at least three well-accepted aspects of the new CIL that are relevant to its domestic status. First, since the new CIL now regulates many of the same topics as domestic law, it conflicts more frequently with domestic law than did the traditional CIL. Second, this new CIL includes at a minimum the prohibitions listed in the *Restatement (Third)*.⁵⁷ Finally, as many commentators have noted, the enormous proliferation of the multilateral human rights treaties and United Nations human rights resolutions on which CIL is based suggests that CIL is expanding rapidly and may already be substantially broader than the *Restatement (Third)*'s list.⁵⁸

and Validity in the Development of Human Rights Norms in International Law, 1979 U. Ill. Legal F. 609.

56. Despite statements by our fellow panelists to the contrary, nothing in our former or present analysis purports to address the merits of this new CIL on the international plane. Compare Bradley & Goldsmith, *supra* note 1, at 839 n.156 ("We take no position here regarding the legitimacy of this transformation [in the source and content of CIL] . . ."), with Neuman, *supra* note 5, at 385 (asserting that we suggest that both traditional and new CIL "has lost its traditional legitimacy"), and Stephens, *The Law of Our Land*, *supra* note 5, at 453 (referring to "[t]he exaggerated fear of international law expressed by authors such as Bradley and Goldsmith"), and Goodman & Jinks, *supra* note 5, at 477 (asserting that we "lament the fact international law increasingly purports to regulate 'many areas that were formerly of exclusive domestic concern'").

57. See *Restatement (Third)*, *supra* note 6, § 702 (stating that CIL prohibits genocide; slavery; summary execution or murder; disappearance; cruel, inhuman, or degrading treatment; prolonged arbitrary detention; and systematic racial discrimination). The *Restatement (Third)* indicated that its list was a conservative one, and that other actions, such as religious and gender discrimination, might also violate CIL. See *id.* cmts. j, l. It further observed that "[o]ther rights may already have become customary law and international law may develop to include additional rights." *Id.* reporters' note 1. Many commentators and international lawyers have expressed the belief that the CIL of human rights is in fact broader than the *Restatement (Third)*'s list. Thus, for example, the Human Rights Committee that was established in connection with the International Covenant on Civil and Political Rights has issued a list "far more expansive" than the *Restatement (Third)*'s list. Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 Ga. J. Int'l & Comp. L. 1, 20 (1995/96) [hereinafter Lillich, *The Growing Importance*].

58. See Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 99 (1989) ("Given the rapid continued development of international human rights, the list [of CIL norms] as now constituted is essentially open-ended. . . . Many other rights will be added in the course of time."); *Restatement (Third)*, *supra* note 6, § 702 cmt. a (noting that its "list [of CIL norms] is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future"); Lillich, *The Growing Importance*, *supra* note 57, at 7 n.43 (reporting that in a speech in 1996, *Restatement (Third)* Chief Reporter Louis Henkin indicated that "if he were drafting Section 702 today he would include as customary international law rights the right to property and freedom from gender discrimination, plus the right to personal autonomy and the right to live in a democratic society"); Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 Ga. J. Int'l & Comp. L. 191, 198-99 (1995/96) [hereinafter Stephens, *Litigating*] (describing CIL as a "developing concept" and

All of our fellow panelists characterize the new CIL applied by federal courts in much narrower terms. Neuman asserts without further explanation that judges should apply only "genuine," well-accepted CIL.⁵⁹ Stephens claims that the CIL applied by U.S. courts has a narrow scope and develops slowly.⁶⁰ Goodman and Jinks propose that the CIL applied by federal courts be limited to *jus cogens* norms.⁶¹ These formulations are understandably designed to narrow concerns about the scope and consequences of the modern position. But the panelists fail to provide a theoretical framework within which these differing formulations can be understood and analyzed. They do not address the radical changes in the post-World War II CIL lawmaking process, and they do not explain, in light of these changes, why the CIL applied by federal courts should be limited as they propose. More basically, they fail to explain the far-from-obvious process by which courts are supposed to identify "genuine" or—something quite different—*jus cogens* norms of CIL. In view of the many uncertainties about how CIL is identified in the post-World War II period, we cannot determine who more accurately characterizes the content and scope of the new CIL—the commentators cited in the preceding paragraph, or our critics. We do think, however, that the extraordinary uncertainty on these crucial issues provides an additional reason why the political branches rather than the courts should decide which aspects of CIL apply as domestic federal law.

We are now in a position to understand what is at stake in the modern position debate. What is at stake is the enforceability of international human rights law in the U.S. federal courts. There is a large and growing body of international human rights *treaties*. But the United States has either not ratified these treaties or has ratified them subject to RUDs that render them unenforceable as domestic law. The modern position claim that CIL is to be applied as federal common law thus "compensate[s] for the abstinence of the United States *vis-a-vis* ratification of international human rights treaties."⁶² It per-

predicting as likely developments "environmental protections and the right to political access—i.e., to vote—and other attributes of democracy"). Commentators have argued, for example, that CIL includes, or will soon include, rights such as freedom of thought, free choice of employment, the right to primary education, the right to form and join trade unions, and rights relating to sexual orientation. See Bradley & Goldsmith, *supra* note 1, at 841-42 & nn.169-71 (collecting a small sampling of sources).

59. Neuman, *supra* note 5, at 376, 27.

60. Stephens, *The Law of Our Land*, *supra* note 5, at 451-52.

61. Goodman & Jinks, *supra* note 5, at 510-11.

62. Simma & Alston, *supra* note 47, at 87. Professor Lillich explained the point more fully as follows:

Although Article VI, section 2 of the Constitution makes treaties the supreme law of the land, the United States always can avoid or lessen the domestic impact of human rights treaties by failing to ratify them or by ratifying them subject to non-self-executing declarations. However, customary international law, at least where the United States has not persistently objected to a particular norm during the process of its formation, *ipso facto*

mits federal courts to accomplish through the back door of CIL what the political branches have prohibited through the front door of treaties.

II. RESPONSE TO CRITICS

In this Part, we respond to our fellow panelists' arguments concerning the historical and democratic bases for the modern position, and the consequences of our thesis for the states, federal executive officials, and the traditional CIL.⁶³

A. Historical Claims

As noted above, much of our critique concerned the historical basis for the modern position. Our fellow panelists take issue with several of our historical claims. First, they challenge our claim that the pre-*Erie* decisions applying CIL do not support the modern position. Second, they challenge our claim that *Sabbatino* did not establish the modern position. And, third, they challenge our claim that the modern position rose to orthodoxy in the 1980s with little scrutiny of precedent or implications. We consider each challenge in turn.

1. The Pre-*Erie* Status of CIL

There is little doubt that, before *Erie*, CIL had the status of general common law, not federal law. The Supreme Court said as much in several decisions in the late eighteenth and early nineteenth centu-

becomes supreme federal law and hence may regulate activities, relations or interests within the United States. . . . Thus, the potential impact of customary international human rights law upon the American legal system is substantial.

Richard B. Lillich, *The Constitution and International Human Rights*, 83 Am. J. Int'l L. 851, 856-57 (1989) [hereinafter Lillich, *The Constitution*]; see also Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 Mich. J. Int'l L. 1, 4 (1992) ("Because the United States has been reluctant to ratify human rights treaties, particularly those with a potential domestic impact, the nature of customary [international] human rights law is the key issue relating to the enforceability of human rights norms in United States courts."); Brilmayer, *supra* note 18, at 324 n.87 ("It is not fatal to international law based arguments that the nation has not signed the relevant conventions. Human rights norms, in particular, have in some cases entered the realm of customary international law as to states that have not signed the relevant international agreements.").

63. It is worth noting at the outset that the panelists do not present a comprehensive defense of the modern position. Thus, for example, (a) none of the panelists claims that CIL historically had the status of federal law, even though the seminal decision approving the modern position made such a claim, as have many academic proponents of the modern position; (b) none of the panelists claims that CIL binds the President or overrules inconsistent federal legislation, even though many proponents of the modern position have made those claims; and (c) each of the panelists suggests a view of the structure and content of CIL that is narrower than that typical of academic proponents of the modern position.

ries.⁶⁴ Many supporters of the modern position have also acknowledged the point.⁶⁵ And it appears that, to one degree or another, each of our fellow panelists has done so as well. CIL's non-federal status prior to *Erie* does not by itself invalidate the modern position. But it does undermine the widespread reliance on pre-*Erie* precedents in support of the modern position.

Although Neuman and Stephens acknowledge that CIL had the status of non-federal general common law before *Erie*, they both seek to find normative support for the modern position in history. Stephens admits that CIL was part of general common law before *Erie* and that cases arising under CIL did not arise under the Constitution or laws of the United States.⁶⁶ She nevertheless criticizes our historical discussion as a "simplified view [that] overlooks the rich and complex role international law has played in our legal system for over 200 years."⁶⁷ She then sets forth a long and detailed description of the framing of the Constitution and the historical status of international law.⁶⁸ In our prior work, we addressed each of her points, none of which affects the central truth that CIL was not viewed as federal law during most of our nation's history.

Stephens correctly notes, for example, that the framers of the Constitution and early U.S. leaders viewed international law as binding on the United States.⁶⁹ But, as we noted in our earlier work, and as Professor Henkin has explained, "[a]lthough international law imposes obligations on nations, it does not purport to specify how the nations must treat international obligations as a matter of domestic law."⁷⁰ During at least the first 150 years of our nation, our constitutional system permitted states to violate CIL unless and until the federal political branches said otherwise through enacted federal law.⁷¹ Stephens is also right that one of the Framers' primary concerns was the inability of the federal government during the Articles of Confederation period to punish infractions of international law, and one of their primary aims was to establish a constitutional structure that would al-

64. See, e.g., *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924); *Huntington v. Attrill*, 146 U.S. 657, 683 (1892); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875).

65. See, e.g., Restatement (Third), *supra* note 6, ch. 2, introductory note, at 41; Henkin, *International Law as Law*, *supra* note 14, at 1556-58.

66. See Stephens, *The Law of Our Land*, *supra* note 5, at 411-12.

67. *Id.* at 397.

68. See *id.* at 399-433.

69. See *id.* at 400-04. This is the likely meaning, for example, of John Jay's statement that "[t]he United States had, by taking a place among the nations of the earth, become amenable to the law of nations." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793). It also may be what Edmund Randolph meant when he stated as Attorney General that the law of nations "is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation." 1 U.S. Op. Atty. Gen. 26, 27 (1792).

70. Bradley & Goldsmith, *supra* note 1, at 819 n.19 (quoting Henkin).

71. See *id.* at 824-26.

low for uniform federal enforcement of CIL.⁷² But, as we noted, and as Stephens seems to acknowledge, this uniformity was *not* guaranteed by the automatic incorporation of CIL into federal law. Rather, uniformity was promoted by empowering the political branches to enact the federal law necessary to carry out international obligations and to create federal courts with exclusive federal jurisdiction.⁷³

Somewhat inconsistent with her acknowledgment that CIL was non-federal general common law, a subsequent section of Stephens's article is entitled "International Law as Federal Law Pre-*Erie*." This section does not live up to its title because it does not cite a single example of CIL being treated as federal law prior to *Erie*.⁷⁴ Stephens first discusses Supreme Court cases in the early nineteenth century that rejected a federal common law of crimes, even in cases involving violations of the law of nations.⁷⁵ These decisions repudiated earlier intimations that CIL might apply as federal law, and therefore support our view of CIL's pre-*Erie* status.⁷⁶ Stephens then cites judicial opinions and other documents referring to the law of nations as "part of

72. See Stephens, *The Law of Our Land*, *supra* note 5, at 402-08.

73. See Bradley & Goldsmith, *supra* note 1, at 824-26; see also Stephens, *The Law of Our Land*, *supra* note 5, at 409-11.

74. Stephens suggests that the Supreme Court recognized federal question jurisdiction on the basis of a claim arising under CIL in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918). See Stephens, *The Law of Our Land*, *supra* note 5, at 429 & n.190. In fact, the Court made perfectly clear that jurisdiction in the Supreme Court was proper because the plaintiff in error had "set up and claimed" a "right" under the Hague Convention of 1907. *Oetjen*, 246 U.S. at 299; see also [1918 version of] 28 U.S.C. § 1257 (declaring that the Supreme Court's jurisdiction over states extends to final state court decisions "where any title, right, privilege, or immunity is specially set up or claimed under [the] Constitution or the treaties or statutes of . . . the United States." (emphasis added)). The fact that the Court went on to reject this treaty claim on the merits did not affect this basis of jurisdiction. Nothing in the opinion suggests that federal jurisdiction was premised on CIL. This is not surprising, given that several decisions just before and after *Oetjen* had rejected that possibility. See *supra* note 64.

75. See Stephens, *The Law of Our Land*, *supra* note 5, at 415-16.

76. See Bradley & Goldsmith, *supra* note 1, at 851 & n.231; see also Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205, 1213 (1988) (observing that, with these decisions, "it became clear that the Republicans had won the debate—the 'laws of the United States' did not include either all of 'general law' or its 'law of nations' component"). Stephens also cites the Supreme Court's adoption of the "*Charming Betsy* canon" in the early 1800s. See Stephens, *The Law of Our Land*, *supra* note 5, at 417. Pursuant to this canon, courts, where fairly possible, are to construe federal statutes not to violate international law. See Restatement (Third), § 114; *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This canon "is influenced by the fact that the courts are obliged to give effect to a federal statute even if it is inconsistent with a pre-existing rule of international law." Restatement (Third), § 114, cmt. a. Thus, the canon is entirely consistent with CIL's status in the nineteenth century as general common law, which was subject to being overruled by federal legislation, and in no way supports the claim that CIL had the status of *federal* law. For a critique of recent attempts to recharacterize the canon along the lines suggested by Stephens, see generally Bradley, *The Charming Betsy Canon*, *supra* note 20.

'our own law,' "part of the law of the land," and the like.⁷⁷ But, as we have explained—and Stephens does not really dispute—those references reflected CIL's status as general common law and do not suggest that CIL was historically considered federal law.⁷⁸

Stephens finally argues that a true federal common law binding on the states began to emerge in the late nineteenth century in areas related to CIL, such as in interstate and maritime cases.⁷⁹ This is true but again unsupportive of Stephens's apparent belief that there were pre-*Erie* antecedents to the modern position. The Court's late nineteenth and early twentieth century federalization of general maritime law and the general common law governing interstate disputes were justified under the theory that Article III's grant of admiralty and interstate jurisdiction authorized federal courts to develop a uniform and supreme federal law within these jurisdictions.⁸⁰ These developments, however, did not extend to most areas of general common law, and they most definitely did not extend to CIL (which, unlike admiralty and interstate disputes, is not listed as a separate head of federal judicial power in Article III).⁸¹ The Court's analysis in the interstate dispute cases makes clear its continuing belief that international law was not federal law.⁸² The same is true of the maritime cases. In the very same year that the Court began to treat the general maritime law as federal law,⁸³ it held that CIL was *not* federal law.⁸⁴ The Court reached this conclusion over Justice Bradley's lone dissent, in which he argued, like Stephens, that CIL should be treated as federal law

77. See Stephens, *The Law of Our Land*, *supra* note 5, at 417.

78. See Bradley & Goldsmith, *supra* note 1, at 824, 849-51.

79. See Stephens, *The Law of Our Land*, *supra* note 5, at 419-25.

80. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 214-15 (1917) (admiralty); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (interstate dispute).

81. An early draft of Article III, apparently written by James Wilson, would have extended federal court jurisdiction to cases arising under the "Law of Nations." See 2 *The Records of the Federal Convention of 1787*, at 157 (Max Farrand ed. 1937). The reference was deleted, however, without explanation. See Henkin, *International Law as Law*, *supra* note 14, at 1560 n.22; Jay, *The Status of the Law of Nations*, *supra* note 11, at 830.

82. The most prominent such case, as Stephens notes, is *Kansas v. Colorado*, 206 U.S. 46 (1907). This decision developed an "interstate common law" to govern interstate disputes. *Id.* at 97-98. Referring back to its earlier decision in the same dispute, the Court said the sources for this new law were "[f]ederal law, state law, and international law, as the exigencies of the particular case may demand." *Id.* at 97 (quoting *Kansas v. Colorado*, 185 U.S. 146 (1902)). The Court's distinction between international and federal law is consistent with the view that CIL was applied during this period as general common law.

83. As Stephens notes, the decision that first squarely held that admiralty law was binding on the states, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), cites *The Lottawanna*, 88 U.S. 558 (1875), as support for this proposition. Stephens, *supra* note 5, at 426-27 n.176 & accompanying text.

84. See *New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1875). The Court held that it lacked jurisdiction to review "general laws of war, as recognized by the law of nations applicable to this case," because they do not involve "the Constitution, laws, treaties, or executive proclamations of the United States." *Id.* at 286-87.

because of the need for uniformity in foreign relations.⁸⁵ The Court continued to hold this view right up until its decision in *Erie*.⁸⁶

Neuman takes a different tack from Stephens. Rather than trying to glean nineteenth century precursors to the modern position, he ignores the difficulties that inhere in relying on the pre-*Erie* decisions as support for the modern position. Thus, while he acknowledges CIL's pre-*Erie* status as general common law, he nonetheless insists that the modern position is in the "well-established tradition of incorporation" with a "pedigree stretching back to the beginning of the Republic."⁸⁷ Similarly, he refers to the "200-year-old practice of judicially incorporating customary international law."⁸⁸

These assertions fail to take account of the fundamental differences between pre-*Erie* general common law and post-*Erie* federal common law. Like the *Filartiga* court's similar move, Neuman wants CIL to apply automatically as *federal law* in our post-*Erie* world on the basis of precedents that applied CIL automatically as *non-federal law* under a framework rejected in *Erie*. The questionable nature of such a move is compounded by the fact that the primary relevance of the modern position concerns the new CIL of human rights, which, unlike the CIL applied by the pre-*Erie* precedents, regulates the way in which a nation treats its citizens.⁸⁹

The failure to take account of these fundamental contextual differences between the modern position and the historical application of CIL is precisely what has led courts and scholars to rely on pre-*Erie* decisions that did not implicate federal question jurisdiction as a basis for federal question jurisdiction; on pre-*Erie* decisions applying traditional customary *inter-national law* that did not purport to trump state law as support for the proposition that the new CIL of human rights trumps state law; and on pre-*Erie* CIL decisions that did not bind the Executive under the Take Care Clause as support for the view that the Executive is so bound under the Take Care Clause. The modern position's reliance on the pre-*Erie* precedents is not, as Neuman insists,

85. Justice Bradley argued that "unwritten international law" was part of the "laws of the United States" because the law of nations was an exclusive federal concern. *Id.* at 288. He added: "It is highly expedient that obligations and immunities [under the law of nations], arising from public law and the public relations of the government, should be subject to uniform rules, and to the final adjudication of the judicial department of the general government." *Id.* Stephens calls the result in *Hendren* "strange" and Neuman calls Bradley's dissent "prescient." See Stephens, *The Law of Our Land*, *supra* note 5, at 428; Neuman, *supra* note 5, at 374 n.14. Whether or not these judgments are warranted, the fact remains that eight members of the Supreme Court in that case rejected the modern position.

86. See cases cited *supra* note 64.

87. Neuman, *supra* note 5, at 376, 388 (emphasis added).

88. *Id.* at 392.

89. Cf. Trimble, *A Revisionist View*, *supra* note 42, at 723 ("[T]here is substantial doubt that modern customary international law is entitled to claim any legitimacy from the tradition of the law of nations.").

merely "old wine in new bottles."⁹⁰ It is a new and much more potent wine in bottles made to look old.

2. *Sabbatino*

Our fellow panelists do not dispute that all post-*Erie* federal common law, including a federal common law of CIL, must be authorized by the U.S. Constitution or a federal statute. They instead argue that the authorization can be found in the structure of the Constitution, and they rely heavily on the Supreme Court's decision in *Sabbatino*⁹¹ for this proposition.

In assessing this argument, it is important to distinguish among three possible claims concerning *Sabbatino*. The first claim is that *Sabbatino* itself held that CIL is federal common law. All of our fellow panelists can be read as making this claim.⁹² This claim, however, is contradicted by *Sabbatino* itself. It is true that *Sabbatino* favorably referred to a three-page essay by Philip Jessup, in which he had argued soon after *Erie* that CIL should be uniformly enforced by the federal courts.⁹³ But one can view this reference as evidence that *Sabbatino* embraced the modern position only if one ignores what the Court in *Sabbatino* actually held and did. The Court held only that the *act of state doctrine* has the status of federal common law.⁹⁴ And it made clear that the act of state doctrine is *not* part of CIL.⁹⁵ Instead, the Court explained that the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers."⁹⁶ Moreover, the Court relied on the act of state doctrine in *Sabbatino* as a reason for *not* applying CIL as domestic law—the opposite of what the modern position requires.⁹⁷ This is

90. Neuman, *supra* note 5, at 380.

91. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

92. See Neuman, *supra* note 5, at 375-76, 29; Stephens, *The Law of Our Land*, *supra* note 5, at 484-89; Goodman & Jinks, *supra* note 5, at 445-46, 528.

93. See Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740 (1939).

94. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) ("We conclude that the scope of the act of state doctrine must be determined according to federal law.").

95. There are at least four statements in the majority opinion to this effect. See *id.* at 421 ("We do not believe that [the act of state] doctrine is compelled . . . by some principle of international law."); *id.* ("That international law does not require application of the doctrine is evidenced by the practice of nations."); *id.* at 422 ("[I]nternational law does not prescribe use of the doctrine."); *id.* at 427 (the act of state doctrine is "compelled by neither international law nor the Constitution"). The dissent also agreed with this point. See *id.* at 444 (White, J., dissenting) (noting that the act of state doctrine is "not a principle of international law").

96. *Id.* at 423; see also *id.* at 427-28 (stating that the act of state doctrine is designed "to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs").

97. *Id.* at 439; see also *id.* at 431 (stating that the import of the Court's prior decisions was that "the act of state doctrine is applicable even if international law has been violated"). Goodman and Jinks assert that the Court held that the act of state

why the decision was viewed at the time of its announcement as a major setback for the application of CIL in U.S. courts.⁹⁸

Despite the Court's clear statements concerning the separation of powers rather than international law basis for the act of state doctrine, Goodman and Jinks attempt to link it with international law in order to bring the modern position within the Court's holding.⁹⁹ The Supreme Court in its most recent act of state decision, however, said unequivocally that the act of state doctrine is considered today "a consequence of domestic separation of powers."¹⁰⁰ And, this is how the lower courts, including courts supportive of the modern position, have interpreted *Sabbatino*.¹⁰¹ It is also how most commentators have read the decision.¹⁰² Finally, if it were in fact true that the Supreme Court held in *Sabbatino* that CIL is federal common law, one would have expected the *Restatement (Second) of Foreign Relations Law*, published one year after *Sabbatino*, to have noticed such a holding. In fact, the *Restatement (Second)* said that, notwithstanding *Sabbatino*,

doctrine precludes only the application of international law that has a "disputed, inchoate, or undefined status." Goodman & Jinks, *supra* note 5, at 484. They point to statements by the Court suggesting that the act of state doctrine might not preclude the consideration of *all* international law issues. See *Sabbatino*, 376 U.S. at 428, 430 n.34; Goodman & Jinks, *supra* note 5, at 481-97. It is far from clear, however, that the Court was endorsing independent judicial application of CIL, let alone application as supreme federal law. The Court referred to "treat[ies] or other unambiguous agreement[s]," *Sabbatino*, 376 U.S. at 430 (emphasis added), which likely meant only treaties and executive agreements, not CIL. And, indeed, the only international law exception to the act of state doctrine generally recognized by the lower courts since *Sabbatino* is for treaties, not CIL. See Gary B. Born, *International Civil Litigation in United States Courts* 738-44 (3d ed. 1996); see also *id.* at 743 (stating that "*Sabbatino* appears to have rejected any such possibility" of a CIL exception to the act of state doctrine); *Callejo v. Bancomer*, 764 F.2d 1101, 1117 n.18 (5th Cir. 1985) ("We are unaware of any cases since *Sabbatino* that have construed customary international law to invalidate a foreign act of state.").

98. See Bradley & Goldsmith, *supra* note 1, at 830 & n.96 (collecting sources).

99. Goodman & Jinks, *supra* note 5, at 488.

100. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 404 (1990).

101. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (stating that the act of state doctrine "reflect[s] the judiciary's concerns regarding separation of powers"); *Republic of the Philippines v. Marcos*, 806 F.2d 344, 358 (2d Cir. 1986) (stating that "*Sabbatino* treats the act of state doctrine as resting fundamentally on separation of powers concerns").

102. See, e.g., Clark, *supra* note 24, at 1303 & n.273 (stating that "the requirement that federal courts adhere to the act of state doctrine stems from the constitutional separation of powers"); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2363 (1991) (stating that the Court in *Sabbatino* "shift[ed] ground from a comity/conflict-of-laws rationale [for the act of state doctrine] to a separation-of-powers/political-question grounding"); see also Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 Colum. L. Rev. 1907, 1911 (1992) [hereinafter Burley, *Law Among Liberal States*] ("According to conventional wisdom, *Sabbatino* transformed the act of state doctrine from a conflicts doctrine to a doctrine of delimitation of competence based on separation of powers principles.").

the status of CIL in U.S. courts was "not settled."¹⁰³ This is presumably why the *Restatement (Second)* did not attempt to describe the domestic legal status of CIL in its black-letter provisions. Indeed, Professor Covey Oliver, one of the reporters for the *Restatement (Second)*, has informed us that he and the other reporters "simply did not find authority to support the position that the . . . *Restatement (Third)* [later] took."¹⁰⁴

A second claim one might make concerning *Sabbatino* is that, although the decision did not itself adopt the modern position, the logic of its federalization of the act of state doctrine applies equally to the status of CIL. At least with respect to the separation of powers claims of the modern position—that CIL as interpreted by federal courts binds the Executive and perhaps overrules inconsistent federal legislation—this claim too is rebutted by *Sabbatino* itself. Whatever else it may have said or implied, *Sabbatino* made clear that the federal political branches rather than the courts have primary responsibility to make federal foreign relations law.¹⁰⁵ It was in recognition of this fact that the Court in *Sabbatino* crafted the act of state doctrine to prohibit the domestic application of CIL. It thus makes no sense to read *Sabbatino* as authorizing courts, in the name of deference to the political branches in the area of foreign relations, to bind the political branches to judicial interpretations of CIL.¹⁰⁶ This is perhaps why none of our fellow panelists seeks to defend that element of the modern position. They do not explain, however, how CIL can be federal law without binding the Executive under the Take Care Clause.¹⁰⁷

This leaves the claim that *Sabbatino* permits federal courts to make federal foreign relations law that trumps inconsistent state law. Because of *Sabbatino*'s novel application of what soon came to be known as the federal common law of foreign relations,¹⁰⁸ this is a more plau-

103. Restatement (Second) of the Foreign Relations Law of the United States § 3, reporters' note 2 (1965) [hereinafter Restatement (Second)]. In a statement that further assumes that *Sabbatino* itself did not hold that CIL is federal law, the *Restatement (Second)* added that "the holding of the *Sabbatino* case that *Erie v. Tompkins* does not apply to the act of state doctrine would appear to apply a fortiori to questions of international law." *Id.* (emphasis added).

104. Letter from Covey T. Oliver to Curtis A. Bradley 1 (1997) (copy on file with the *Fordham Law Review*).

105. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-33 (1964).

106. See Bradley & Goldsmith, *supra* note 1, at 860-61.

107. All of our fellow panelists wish to assign the status of federal law to CIL but none of them is willing to defend any implications of this status other than those for federal court jurisdiction and preemption of state of law. This is an insufficient response. If CIL is part of the "Laws of the United States" within the meaning of Articles III and VI, then why, for example, is it not also part of the "Laws" that the President must faithfully execute? CIL's status as federal law cannot be defended simply by pointing to some implications of this status that might be desirable and ignoring other possible implications that might not be desirable.

108. See John Norton Moore, *Federalism and Foreign Relations*, 1965 Duke L.J. 248, 261-91; Friendly, *supra* note 31, at 408 n.119.

sible position. It is far from certain, however. The majority opinion in *Sabbatino* is notoriously inscrutable,¹⁰⁹ and there is much debate regarding the justifications for and scope of the federal lawmaking power that it conferred on federal courts. Some commentators suggest that it broadly authorizes federal courts to make federal common law, subject to congressional override, whenever courts decide that federal foreign relations interests so require.¹¹⁰ Others would apply the doctrine more narrowly based on a balance of functional considerations.¹¹¹ Yet others who are sensitive to *Sabbatino*'s emphasis on the relative incompetence of courts to make foreign relations judgments view the doctrine as one that "protect[s] courts from entanglements in, and interbranch conflicts about, matters for which they are not institutionally suited."¹¹² Finally, some argue that the federal common law of foreign relations lacks normative justification and has been effectively repudiated by the Supreme Court in the years since *Sabbatino*.¹¹³

Our earlier work explained in detail why we think that most of these readings will not support the modern position's federalism claims.¹¹⁴ One major problem is that, regardless of the scope of the federal common law of foreign relations, it is far from clear that it justifies federalization of the new CIL of human rights, which governs not primarily interstate relations but rather the relations between a nation and its citizens. We wish to re-emphasize here an additional point that substantially undermines any support that *Sabbatino* might otherwise have provided for these claims.

The federal common law authorized in *Sabbatino*, like all non-constitutional federal common law, "implements the federal Constitution and statutes, and is conditioned by them."¹¹⁵ The modern position is

109. For an excellent discussion of the uncertainties raised by *Sabbatino*, see Louis Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 Colum. L. Rev. 805 (1964) [hereinafter Henkin, *The Foreign Affairs Power*].

110. See, e.g., Erwin Chemerinsky, *Federal Jurisdiction* § 6.2.4, at 350 (2d ed. 1994) ("*Sabbatino* still stands for the important proposition that in cases related to foreign affairs, federal courts may fashion federal common law."); Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 125 (2d ed. 1990) (stating that *Sabbatino* recognized "the power of the federal judiciary to create federal common law in the field of international relations").

111. See, e.g., Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 Vand. J. Transnat'l L. 133, 159-73 (1971) [hereinafter Maier, *The Bases and Range of Federal Common Law*].

112. Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 Tex. L. Rev. 1551, 1577 (1992); see also Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va. J. Int'l L. 505, 550-52 (1997) [hereinafter Bradley, *Territorial Intellectual Property Rights*] (making a similar point).

113. See Jack Goldsmith, *Federal Courts, Foreign Relations, and Federalism*, 83 Va. L. Rev. 1617 (1997).

114. See Bradley & Goldsmith, *supra* note 1, at 860-70.

115. *D'Oench, Duhme & Co., Inc. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (emphasis added); see also Neuman, *supra* note 5, at

relevant today mainly with respect to the new CIL of human rights. The primary source of the CIL of human rights is the multilateral human rights treaties.¹¹⁶ As we noted above, however, the political branches have sought, through non-ratification or through ratification conditioned by RUDs, to ensure that these international human rights treaties do *not* apply as domestic federal law and do *not* preempt inconsistent state law.¹¹⁷ This means that the federal political branches have declared, contrary to the modern position, that a principal source of the CIL of human rights should not be considered a source of federal law. The logic of post-*Erie* federal common law, even under a broad reading of *Sabbatino*, does not permit federal courts to do via federal common law what the political branches have clearly prohibited in their conditional assent to these treaties. This is especially true given that, as the Supreme Court has repeatedly emphasized, federal court deference to political branch wishes should be at its apex in this foreign relations context.¹¹⁸ As a result, even the broadest possible reading of *Sabbatino* fails to support the modern position with respect to the new CIL. None of our fellow panelists has addressed this dis-

381 ("Federal common law is made within the framework of existing federal statutes, and not in contradiction to it."). One consequence of this is that the federal common law of foreign relations remains subject to congressional revision. Thus, for example, Congress overruled *Sabbatino*'s act of state holding. See 22 U.S.C. § 2370(e)(2) (1994) (declaring that an act of state doctrine shall not prevent U.S. courts presented with "a claim of title or other right to property" from inquiring into the validity of foreign expropriations of such property under international law), *constitutionality upheld*, *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 971-73 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166, 178-83 (2d Cir. 1967).

116. See Henkin, *Politics and Values*, *supra* note 40, at 36; Bradley & Goldsmith, *supra* note 1, at 832, 839-40; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am. U. L. Rev. 1, 12 (1982) [hereinafter Sohn, *The New International Law*].

117. See *supra* notes 50-52 & accompanying text.

118. See, e.g., *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (stating that foreign policy decisions "are wholly confided by our Constitution to the political departments of the government, Executive and Legislative"); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government . . ."). We are baffled by Neuman's oblique suggestion that our thesis has a kinship with the proposed Bricker Amendment. See Neuman, *supra* note 5, at 385. That Amendment, which had various versions, would have (among other things) limited the power of the Senate to consent to self-executing treaties. See Duane Tananbaum, *The Bricker Amendment Controversy* 32-48, 221-23 (1988). Our thesis does not in any way entail these or any other limitations on the Senate's power. To the contrary, our thesis urges respect for the Senate's and the President's consistent exercise of their constitutional prerogatives to condition assent to these human rights treaties on the exclusion of these treaty norms from domestic federal law. By ignoring and circumventing these exercises of the Senate's treaty power, it is the modern position, not us, that attempts to diminish the power of the Senate.

positive argument against judicial incorporation of the new CIL of human rights.¹¹⁹

3. The Rise of the Modern Position

Much of Neuman's article is devoted to the claim that our account of the recent rise of the modern position is "badly misinformed."¹²⁰ He says that we "assert[] that the Reporters [of the *Restatement (Third)*] misled the American Law Institute into adopting an approach supported only by academic commentary"¹²¹ and that the ALI was "subordinated to academic fiat."¹²² He further asserts that our critique of the modern position is "embedded in a bizarre conspiracy theory."¹²³

Neuman has distorted our account. We did not say that the academy "misled" or "subordinated" anyone, or that the rise of the modern position resulted from a "conspiracy." Nor did we impugn the motives of those who claimed in 1980 that it was well settled that CIL, including the new CIL of human rights, had the status of federal law. We acknowledged that, by 1980, the modern position had the support of some prominent academics and, based on an a-historical reading of *The Paquete Habana*, combined with a casual reading of *Sabbatino*, appeared plausible.¹²⁴ Our claim regarding the rise of modern position was, and is, simply that its adoption in 1980 by both the ALI and the Second Circuit in *Filartiga* was not supported by decisional authority and was not accompanied by substantial debate regarding its dramatic consequences for domestic legal governance.¹²⁵

Here is a brief summary of the historical record: In 1965, the *Restatement (Second)* correctly observed—after expressly considering the significance of *Sabbatino*¹²⁶—that the domestic legal status of CIL was "not settled."¹²⁷ In 1980, however, the Tentative Draft of the *Restatement (Third)* proclaimed that CIL's status as domestic federal law

119. Neuman comes closest to addressing this argument when he states that the argument "deserves exploration with greater precision and documentation" than we have provided, and raises several questions about it. Neuman, *supra* note 5, at 387 & n.78.

120. Neuman, *supra* note 5, at 377.

121. *Id.*

122. *Id.* at 378.

123. *Id.* at 371.

124. See Bradley & Goldsmith, *supra* note 1, at 874.

125. See *id.* at 827-38.

126. The Tentative Draft of the *Restatement (Second)*, promulgated in 1962, did not contain any statement about the domestic legal status of CIL. This draft required revision after the 1964 *Sabbatino* decision. See 41 A.L.I. Proc. 21, 57-58. The final version of the *Restatement (Second)* contained the new Reporters' Note 2 to Section 3, which was not contained in the 1962 draft, and which stated that CIL's domestic status was "not settled."

127. *Restatement (Second)*, *supra* note 103, § 3 reporters' note 2.

"had now been established"¹²⁸ and that "courts have declared" that CIL is supreme federal law. The *Restatement*, however, did not cite a single decision since the publication of the *Restatement (Second)* in support of these views. The final 1987 version of the *Restatement (Third)* did cite one of Chief Reporter Henkin's law review articles in support of the modern position.¹²⁹ But that article cited *only* the 1980 Tentative Draft of the *Restatement (Third)* for the very proposition—"general agreement" that CIL was federal law—for which it was being cited in the final version of the *Restatement (Third)*.¹³⁰ This is what we referred to as "pure bootstrapping"¹³¹—and that is exactly what it was.

Although the *Restatement (Third)* itself failed to cite supporting decisions issued after the *Restatement (Second)*, Neuman has found one decision in the 1965-1980 period that he claims the *Restatement (Third)* could have cited—the Second Circuit's decision in *Fiocconi v. Attorney General*.¹³² This decision *declined* to apply CIL, and, although it did appear to assume that CIL was judicially enforceable,¹³³ it never considered CIL's status in the U.S. legal system. This single, uncertain dictum certainly does not demonstrate what Neuman refers to as a "widely held conclusion, shared by judges" in 1980 in support of the modern position.¹³⁴ Similarly, had the *Restatement*

128. *Restatement (Third) of the Foreign Relations Law of the United States* (Tentative Draft No. 1 1980), pt. I, ch. 2, introductory note at 40-41.

129. See *Restatement (Third)*, *supra* note 6, pt. I, ch. 2, introductory note at 42 (citing Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555 (1984)).

130. Henkin, *International Law as Law*, *supra* note 14, at 1559-60 & n.22.

131. Bradley & Goldsmith, *supra* note 1, at 836.

132. 462 F.2d 475 (2d Cir. 1972). Neuman also cites the Nixon Administration's *amicus curiae* brief in *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969), which argued in the context of consular immunity that CIL was federal law. See Neuman, *supra* note 5, at 377. But this brief, which obviously is not a judicial precedent and thus does not support the *Restatement (Third)*'s claims, shows only that the modern position was plausible enough after *Sabbatino* to be invoked when it suited the Executive's ends. Later Executives would similarly embrace or reject the modern position in *amicus* briefs as it suited their political needs. Thus, for example, the Reagan Administration largely disavowed the modern position in its brief in the *Marcos* litigation in the Ninth Circuit. See Brief for the United States as Amicus Curiae at 3-5, 9-10, 12, *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. July 10, 1989) (No. 86-2448). Moreover, there obviously has not been Executive support for the proposition, advanced by a number of proponents of the modern position, that the Executive does not have the authority to violate CIL. Indeed, the Executive has refused to comply with CIL in a number of prominent cases in recent years. See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (involving the abduction of foreign citizen); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986) (involving the detention of undocumented aliens).

133. See *Fiocconi*, 462 F.2d at 479 n.7.

134. Neuman, *supra* note 5, at 378. In addition to being dicta, the court's international law analysis in *Fiocconi* rested on a premise that appears to have since been rejected by the Supreme Court. The issue for the court in *Fiocconi* was whether additional criminal charges that had been filed against two defendants after they had been extradited to the United States should have been dismissed pursuant to the "specialty

(Third) bothered to cite *Fiocconi*, the decision would not have supported its claim that, since 1965, "a different view [about the domestic status of CIL] *has prevailed*."¹³⁵ Nor would it have supported its assertion that "[t]he courts have held that . . . federal determinations and interpretations of customary international law *are also supreme over state law*."¹³⁶ Even today we cannot find a single decision that squarely holds that CIL is federal law within the meaning of the Supremacy Clause.¹³⁷

Neuman also invokes the *Filartiga* decision, which was decided the same year as the publication of the first Tentative Draft of the *Restatement (Third)*. This decision did, of course, endorse the modern position. The final version of the *Restatement (Third)*, however, never cited this decision for the domestic legal status of CIL. This may be because *Filartiga*'s endorsement of the modern position rested on the premise that CIL had historically been treated as *federal common law*,¹³⁸ whereas the *Restatement (Third)* correctly acknowledged that

doctrine," which, when it applies, precludes prosecution of a person who has been extradited for an offense other than the one for which the person was extradited. The court noted that, if the matter were *res nova*, it might well hold that the issue was "not a matter proper for judicial cognizance," since the additional charges did not violate any statute or treaty. *Fiocconi*, 462 F.2d at 477. The court, however, thought itself bound to consider the claim because of an 1886 Supreme Court decision, *United States v. Rauscher*, 119 U.S. 407 (1886), which it construed as holding that the specialty doctrine is judicially enforceable as a matter of CIL or federal common law. *Fiocconi*, 462 F.2d at 478-79. The court's premise—that the specialty doctrine recognized in *Rauscher* was a matter of CIL or federal common law—appears to have been rejected, at least implicitly, by the Supreme Court in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). There, both the majority and the dissent characterized *Rauscher* as having interpreted an extradition treaty, not as having announced some independent principle of CIL or federal common law. *See id.* at 659; *see also id.* at 675 (Stevens, J., dissenting).

135. *Restatement (Third)*, *supra* note 6, pt. I, ch. 2, introductory note at 42 (emphasis added).

136. *Id.*, § 1, reporters' note 5, at 14 (emphasis added).

137. Neuman also contends that, while "[t]he court's reasoning may be susceptible to different interpretations," the New York Court of Appeals recognized in *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969), that "it applies customary international law by obligation and not . . . by choice." Neuman, *supra* note 5, at 377 n.36. The court in that case, however, never clearly explained its views concerning the status of CIL, probably because the principal dispute in that case concerned the content of CIL, not its status. *See Argentina*, 250 N.E.2d at 699. The court's citation of pre-*Erie* decisions suggests that it may have had something in mind similar to general common law. *See id.* at 700. In any event, the CIL applied in that case has little current relevance to domestic litigation, since consular immunity is regulated by the Vienna Convention on Consular Relations, to which the United States is now a party. *See Vienna Convention on Consular Relations and Optional Protocol on Disputes*, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Approximately 158 nations have ratified the Convention. *Multilateral Treaties Deposited with the Secretary-General*, United Nations, New York (ST/LEG/SER.E), as available on <http://www.un.org/Depts/Treaty> on Oct. 28, 1997. Although it is conceivable that a case could arise involving the immunity of a consulate not covered by the Convention, there has not been even one such case in U.S. courts.

138. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980).

CIL was treated as general common law before *Erie*.¹³⁹ Despite the questionable premise of the *Filartiga* decision, a number of courts have relied on *Filartiga* for the modern position with very little scrutiny of its reasoning.¹⁴⁰ And neither *Filartiga* nor its progeny have focused on the implications for domestic lawmaking processes of assigning federal common law status to CIL. We described the rise of the modern position as characterized by this sort of insufficient deliberation, not by deception.¹⁴¹

While we did not claim and do not believe that the modern position resulted from a "coup,"¹⁴² we do believe that Neuman significantly understates the influence of the American academy on the enforcement of human rights law in the United States. This influence has at least two dimensions.¹⁴³ First, American academics have played an important role in the development of the new CIL, through their participation in international institutions as well as through the writing of treatises and law review articles.¹⁴⁴ Academic influence has been so substantial that Professor Sohn, one of the Reporters for the *Restatement (Third)* and a leading human rights commentator, observed recently that "states really never make international law on the subject of human rights," but rather "[i]t is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals."¹⁴⁵

139. See *Restatement (Third)*, *supra* note 6, ch. 2, introductory note at 41.

140. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980). *But cf.* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring) (criticizing *Filartiga*'s logic but not directly questioning the view that CIL is federal common law). Neuman acknowledges that *Filartiga* and its progeny "would have been more scholarly if they had accurately portrayed the stage-by-stage evolution of U.S. approaches to international law," but he defends *Filartiga*'s reasoning as an "attempt[] to synthesize cases from all periods of U.S. history." Neuman, *supra* note 5, at 379-80. We fail to see how a fundamental misunderstanding about history constitutes a proper synthesis of history.

141. It is against the baseline of this mischaracterization of our earlier article that Neuman asserts that in this Article we "distance [ourselves] from the accusations that [the earlier article] made about the drafting of the Third Restatement." Neuman, *supra* note 5, at 388. We did not say what he says we did in our first article, and we have not changed our views here.

142. Neuman, *supra* note 5, at 377-78.

143. See Bradley & Goldsmith, *supra* note 1, at 875-76.

144. See Janis, *supra* note 48, at 51-52, 79-84. As Professor Janis notes, "the decisions of judges . . . and the doctrines of scholars have played a surprisingly important part in the development of international law." *Id.* at 79; see also, e.g., David Massey, Note, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 Yale J. Int'l L. 419 (1997) (explaining the predominant role of academics in the development of the reasonableness standard typically stated to be a CIL limitation on the extraterritorial application of a nation's laws).

145. Louis B. Sohn, *Sources of International Law*, 25 Ga. J. Int'l & Comp. L. 399, 399 (1995/96) [hereinafter Sohn, *Sources*].

Second, academic commentators have almost uniformly endorsed the modern position. They have done so through their involvement in drafting the influential *Restatement (Third)* as well as through writing numerous law review articles proclaiming the modern position as settled doctrine. In addition, *amicus curiae* briefs and affidavits written by academic proponents of the modern position have now become a staple of international human rights litigation.¹⁴⁶ Moreover, some scholars have been testifying in such cases as expert witnesses, and not only about the content of CIL but also about its status in the U.S. legal system.¹⁴⁷ The views of academic commentators may be particularly influential in this context, given the relative unfamiliarity of U.S. judges with international law as well as the traditional deference courts have paid to scholars concerning international law issues.¹⁴⁸

B. *Democracy*

Our earlier work maintained that judicial federalization of CIL without political branch authorization is inconsistent with American constitutional democracy on two grounds.¹⁴⁹ The first concerns the non-American source of the CIL that the modern position obliges courts to apply as federal law. This law, as Professor Henkin has noted, "is not made by the United States and through its governmental institutions alone but by them together with many foreign governments in a process to which the United States contributes only in an uncertain way and to an indeterminate degree."¹⁵⁰ The second ground concerns the application of this law against states by federal courts without the filter of constitutional or legislative authorization. We argued that this was inconsistent with the Supreme Court's modern federalism jurisprudence, especially in the context of the new CIL, which implicates traditional state prerogatives.¹⁵¹ The Supreme Court's abandonment in the 1980s of federalism as a substantive limit on federal power was justified by the premise that state interests were protected in Congress by the "internal safeguards of the political pro-

146. There are many examples. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 235-36 (2d Cir. 1995) (numerous *amicus curiae* briefs submitted to the court, many of them bearing the names of law professors); *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 (D. Mass. 1995) (citing joint affidavit from 27 international law scholars); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 & n.2 (N.D. Cal. 1988) (noting affidavits from eight international law scholars); see generally Lillich, *The Growing Importance*, *supra* note 57, at 23-24 (referring to the "ubiquitous . . . 'Affidavit of International Law Scholars' that has become the norm in recent human rights cases").

147. See Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 Ga. J. Int'l & Comp. L. 205, 217-19 (1995/96) [hereinafter Maier, *The Role of Experts*].

148. See Bradley & Goldsmith, *supra* note 1, at 874-76.

149. See *id.* at 857-59, 868-69.

150. Henkin, *Foreign Affairs*, *supra* note 12, at 508 n.16; see also Bradley & Goldsmith, *supra* note 1, at 850.

151. See Bradley & Goldsmith, *supra* note 1, at 868-70.

cess."¹⁵² But this political process justification for federal intrusion into state prerogatives does not apply when federal courts apply CIL as federal common law in the absence of political branch authorization.¹⁵³

The manner in which U.S. courts apply customary international human rights law raises a third type of democratic concern not addressed in our earlier work. In the typical case, a U.S. court applies CIL to regulate the mistreatment abroad of one alien by another alien acting under color of foreign law.¹⁵⁴ The United States may be the only country in the world that applies customary international human rights law in this fashion.¹⁵⁵ Even assuming that the defendant-alien's country has consented to this law on the international plane, there is no evidence that this consent extends to domestic enforcement in the United States or any other country. Indeed, it is the absence of an agreed-upon customary law of domestic enforcement that requires federal courts in so many human rights cases to *imply a cause of action as a matter of U.S. law*.¹⁵⁶ The point is even more apparent with respect to the numerous remedies created by federal courts in these cases. On remand in *Filartiga*, for example, the district court created and awarded a punitive damages remedy that was not contemplated by either international law, Paraguayan law, or enacted United States law.¹⁵⁷

It is against this background that one must consider Neuman's argument that judicial federalization of CIL is democratic because it is

152. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985).

153. The Supreme Court's recent reinvigoration of federalism limits on federal power only strengthens this argument. See, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). These decisions may represent a retreat from the "political process" theory of *Garcia*. See John Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 201 (1997). The point remains, however, that to the extent that the political process rationale justifies any federal intrusion on state interests, it does so only with respect to political branch enactments and not to pure federal common law. See *Merrill*, *supra* note 32, at 17.

154. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

155. See Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 Yale J. Int'l L. 65, 101 (1995) ("[N]o other nation invites such cases into its courts."); Beth Stephens, *Litigating*, *supra* note 58, at 200 ("International human rights litigation will greatly increase in value if it is conducted in many countries around the world, not just in the United States.").

156. See Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts* 112-18 (1996); Steinhardt, *supra* note 155, at 72-82; see also William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 475 (1986) ("There is serious doubt . . . whether international law, unassisted by domestic law, creates a tort remedy that may be invoked in domestic courts by private individuals.").

157. *Filartiga*, 577 F. Supp. at 860; see generally Steinhardt, *supra* note 155, at 93-98, 101-03 (explaining that in ATS cases many remedial issues like damages have been governed by federal common law because of "lack of international precedent" and proposing international treaty to fill this gap).

subject to congressional revision.¹⁵⁸ This argument first of all proves too much. It would justify the creation of *any* (non-constitutional) federal common law, including the *Swift*-ian general common law expressly abrogated in *Erie*, since all such law can be overruled by Congress. Moreover, Neuman's argument runs counter to the normal constitutional presumption that state law governs in the face of political branch silence.¹⁵⁹ The Supreme Court's reversal of this presumption in the dormant commerce clause context has been justified on the ground that the federal political branches by themselves are incapable of protecting important federal prerogatives.¹⁶⁰ Neuman has made no such argument in the context of CIL, however, and there is little basis for one.¹⁶¹ Finally, if judicial common law-making is constitutionally improper—as we think it is in this area—it should not be allowed to occur in the first place.¹⁶²

158. See Neuman, *supra* note 5, at 387; see also Brilmayer, *supra* note 18, at 334, 336; Michael J. Glennon, *Process Versus Policy in Foreign Relations: Foreign Affairs and the United States Constitution*, 95 Mich. L. Rev. 1542, 1553 (1997) (book review) [hereinafter Glennon, *Process Versus Policy*]; Henkin, *International Law as Law*, *supra* note 14, at 1566. Not all proponents of the modern position even agree that Congress can in fact overrule judicial applications of CIL. See *supra* note 20.

159. See Merrill, *supra* note 32, at 37.

160. See Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 435 (1982); Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 222 (1957); Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552, 1586 (1977).

161. See Goldsmith, *supra* note 113.

162. See Merrill, *supra* note 32, at 22. Neuman also contends that if the modern position is undemocratic on the federal level, then allowing state courts to apply CIL without legislative authorization would be equally undemocratic. See Neuman, *supra* note 5, at 383-84. As noted above, it is not at all clear that our position would lead to independent applications of CIL by the state courts. Nor are we endorsing such a role for these courts. If state governments did decide to allow their courts to act in this way, however, there is probably nothing in the federal constitution that would prevent them from doing so. State institutional arrangements, including the relative power of state courts vis-a-vis state political branches, generally are not a matter of federal constitutional concern. Thus, for example, many state courts are authorized to provide advisory opinions, but "it is firmly established that federal courts cannot [do so]." Chemerinsky, *supra* note 110, § 2.2, at 48. More significantly, state courts may engage in general common-lawmaking, but the federal courts have been disallowed from doing so since 1938. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."); cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."). Like these issues, the legitimacy of state court applications of CIL is a matter of state constitutional law, which may or may not allow for it. Neuman is therefore incorrect in asserting that the "same problem" associated with the modern position also exists with respect to state court applications of CIL. Neuman, *supra* note 5, at 383; cf. Bradley, *Territorial Intellectual Property Rights*, *supra* note 112 (noting similar points to explain differential treatment of extraterritoriality of federal and state statutes). This is not to argue that independent application of CIL by state judges is democratic; at least for unelected state judges, our democracy concerns

The Supreme Court recently rejected arguments very similar to Neuman's in a related foreign relations context. In *Barclays Bank v. Franchise Tax Board of California*,¹⁶³ the Court considered a challenge under the dormant commerce clause to the constitutionality of California's "worldwide combined reporting" method for taxing multinational corporations. This state law had provoked enormous diplomatic controversy with the United States' closest trading partners and had been opposed in numerous executive pronouncements.¹⁶⁴ The Court nevertheless rejected the claim. It explained that concerns about foreign sovereign retaliation were "directed at the wrong forum" because courts lack the power "to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the states tax as they please."¹⁶⁵ The Court also dismissed as irrelevant the California scheme's inconsistency with "Executive Branch communications [including *amicus* briefs] that express federal policy but lack the force of law."¹⁶⁶ What mattered to the Court was that no validly enacted federal law had preempted the state action.¹⁶⁷ Similar reasoning can be found in the Court's recent federal common law decisions.¹⁶⁸

The democratic pedigree of the modern position contrasts sharply with the processes by which the other principal form of international law—treaties—are incorporated into federal law.¹⁶⁹ Treaties are negotiated by the Executive and generally take the form of written documents. Formal ratification under Article II requires both the agreement of the Executive and the "advice and consent" of two-

might argue against judicial activism in applying CIL at the state level. But this would hardly constitute an argument for the modern position.

163. 512 U.S. 298 (1994).

164. *Id.* at 324 n.22, 328-29.

165. *Id.* at 328 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983)).

166. *Id.* at 330.

167. *See id.* at 331 ("[W]e leave it to Congress—whose voice, in this area, is the Nation's—to evaluate whether the national interest is best served by tax uniformity, or state autonomy."). Stephens claims that this decision *supports* the modern position because it shows that "in areas touching upon foreign affairs and international law, great deference is paid to the political branches." Stephens, *The Law of Our Land*, *supra* note 5, at 448 n.282. She does not explain how such deference, however, supports independent judicial authority to preempt state law—the very thing called for by the modern position yet rejected in *Barclays Bank*. Moreover, Stephens fails to consider the substantial empirical evidence, discussed above, that suggests that the political branches do not want the new CIL to be automatically incorporated into domestic law. In light of that evidence, deference to the political branches clearly cuts *against* the modern position, not in favor of it.

168. *See Atherton v. FDIC*, 117 S. Ct. 666, 670-74 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-89 (1994).

169. *See Bradley & Goldsmith*, *supra* note 1, at 858-59.

thirds of the Senate.¹⁷⁰ Even less formal "executive agreements" usually involve the concurrence of at least a majority of Congress.¹⁷¹ Moreover, neither formal treaties nor executive agreements are enforceable federal law unless they are "self-executing" in nature or are accompanied by implementing federal legislation.¹⁷²

By contrast, CIL is unwritten and relatively amorphous. The date and circumstances of its creation are often uncertain. And no formal endorsement from this country's representatives is required in order for it to have binding force on the international plane. Indeed, this country can be bound by CIL concerning which it has taken no position at all.¹⁷³ Despite these features, which from the perspective of domestic governance make CIL less democratic than treaties, the modern position claims that all of CIL is automatically self-executing federal law. Even more dramatically, this claim is made in the face of a consistent refusal by the political branches to allow human rights treaties, the source of much of the new CIL, to become self-executing federal law. In our view, any defense of the modern position must adequately explain this anomaly. None of our fellow panelists has even attempted to do so.

C. States

Our earlier work concluded that federal courts should not apply CIL as federal law without some authorization to do so by the federal political branches. This view does not, as Neuman and Stephens appear to believe, require that CIL be a matter of state common law.¹⁷⁴ Their error is to assume that (a) CIL *must* be enforceable by courts, and (b) if it is not enforceable as federal law, it must be enforceable as state law. They have provided no argument for (a), and (b) is wrong. Under *Erie*, if CIL is not federal law, federal courts are not to apply it unless they determine that it is part of state law. We suspect that in most cases, states would rarely incorporate CIL into state law. In this

170. See U.S. Const. art. II, § 2, cl. 2 (stating that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

171. See Loch K. Johnson, *The Making of International Agreements* (1984).

172. See Restatement (Third), *supra* note 6, § 111(3).

173. See *id.* at pt. I, ch. 1, introductory note at 18 ("[S]tates may be bound by a rule of customary law that they did not participate in making if they did not clearly dissociate themselves from it during the process of development.").

174. See Neuman, *supra* note 5, at 382 (referring to our "State law proposal" and our "[r]educ[ti]on of] customary international law to State common law"); *id.* at 382 (asking "which State's common law" would govern under our proposal); *id.* at 383 (describing our "proposed solution" as "enforcement of customary international law as State common law"); Stephens, *The Law of Our Land*, *supra* note 5, at 395 (describing our argument as one that would make CIL "part of state law"); *but cf.* Neuman, *supra* note 5, at 388 n.80 (noting that under our proposal, "State courts would be free to adopt, reject, or impose their own views of customary international law").

circumstance, CIL simply would not be a rule of decision in federal court.

The claim that states have even a *potential* role in interpreting CIL unless and until Congress acts to preempt them may seem surprising. But it should not. States have always played an important role in enforcing U.S. obligations under CIL, even with respect to *inter-national* affairs.¹⁷⁵ And this traditional CIL is not even what is at stake in debates over the modern position. As explained above, most of the traditional CIL that is relevant to domestic litigation has been federalized by the political branches in treaties and statutes.

With respect to what is really at stake in the modern debates—the enforcement of international human rights law—a potential role for states seems even less problematic. Many human rights issues—for example, the legality of the juvenile death penalty—fall within traditional state prerogatives that should be interrupted, if at all, only by the states themselves or the federal political branches. In addition, if the states did incorporate international human rights norms into their law, this would only make them *more* rights-protecting than the federal government, something that the Constitution allows in other contexts.¹⁷⁶ In this connection, we are surprised by Stephens's assertion that our position entails "a quite radical view of state jurisdiction."¹⁷⁷ Assume, for example, that a state interpreted CIL to prohibit discrimination on the basis of sexual preference and enacted a state statute to incorporate this international law into state law. Assuming no conflict with the Constitution or a federal statute, there is nothing obviously "radical" about allowing the state such authority.¹⁷⁸

Neuman and Stephens object that states cannot incorporate or violate international law because such tasks are exclusive foreign relations prerogatives of the federal government.¹⁷⁹ This is the conventional rhetoric. When looked at closely, however, it does not even hold true for traditional foreign relations functions. The Constitution limits states' roles in a few, specifically-defined foreign affairs contexts, as listed in Article I, Section 10. And it gives the political branches broad powers to preempt the states in areas relating to foreign affairs.¹⁸⁰ The Supreme Court's statements about federal exclu-

175. See Bradley & Goldsmith, *supra* note 1, at 825-26; see also Henkin, *Foreign Affairs*, *supra* note 12, at 150-51.

176. See Bradley, *The Status of Customary International Law*, *supra* note 23.

177. Stephens, *The Law of Our Land*, *supra* note 5, at 397.

178. For a different explanation of how independent state authority to incorporate international law might actually advance the cause of human rights, see Spiro, *supra* note 52.

179. Neuman, *supra* note 5, at 375-77; Stephens, *The Law of Our Land*, *supra* note 5, at 438-41.

180. See U.S. Const. art. I, § 8, cl. 1 (granting Congress the power to "collect Taxes, Duties, Imposts and Excises, [and] to . . . provide for the common Defence"); *id.* cl. 3 (granting Congress the power to "regulate Commerce with foreign Nations"); *id.* cl. 4 (granting Congress the power to "establish a uniform Rule of Naturalization"); *id.* cl.

sivity in foreign relations that Neuman and Stephens cite were *all* made in cases in which the Court was upholding federal political branch enactments.¹⁸¹ They do not stand for the much different idea that federal courts can on their own prerogative preempt state law under a foreign affairs rationale. Such a power was asserted for the first time in the 1960s,¹⁸² and, as we said above, the legitimate scope of this power is highly contested.

Neuman's and Stephens's "foreign affairs exclusion" position makes even less sense with respect to the new CIL that is centrally at issue here. This new CIL regulates intra-national affairs traditionally regulated by states in the absence of federal legislation. Even if there were a judicially-enforceable preemption for state actions on the international plane, it requires more argument than Neuman and Stephens have provided to show that a state's treatment of its own citizens is an action on the international plane. Moreover, it makes little sense under a foreign relations preemption rationale for courts to apply this customary international human rights law against the states, especially since, as mentioned above, the political branches have taken pains to ensure that the treaties upon which this law is based do not apply as domestic federal law.

D. *Executive Officials*

As noted above, one of the possible implications of the modern position is that CIL is judicially enforceable against the President. There has been substantial debate among proponents of the modern position

5 (granting Congress the power to "regulate the Value . . . of foreign Coin"); *id.* cl. 10 (granting Congress the power to "define and punish . . . [o]ffences against the Law of Nations"); *id.* cl. 11 (granting Congress the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); *id.* cls. 12-13 (granting Congress the power to "raise and support Armies" and "provide and maintain a Navy"); *id.* cl. 14 (granting Congress the power to regulate "land and naval Forces"); *id.* cl. 16 (granting Congress the power to organize, arm, discipline, and train the militia); *id.* art. II, § 1, cl. 1 (vesting the executive power in the President); *id.* § 2, cl. 1 (providing that the President is the commander-in-chief of the armed forces); *id.* cl. 2 (granting the President the power, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"); *id.* (granting the President the power, "by and with the Advice and Consent of the Senate, [to] appoint Ambassadors, other public Ministers and Consuls"); *id.* cl. 3 (providing that the President "shall take Care that the Laws be faithfully executed").

181. See Neuman, *supra* note 5, at 375-76; Stephens, *The Law of Our Land*, *supra* note 5, at 438-41. Thus, for example, the Court in *Hines v. Davidowitz*, 312 U.S. 52 (1941), held that a state immigration statute was preempted by a similar federal statute, *id.* at 56; the Court in *United States v. Pink*, 315 U.S. 203 (1942), and *United States v. Belmont*, 301 U.S. 324 (1937), held that an Executive Agreement preempted state property laws; and the Court upheld a statutory delegation of power to the President in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

182. See Henkin, *Foreign Affairs*, *supra* note 12, at 163; Bradley & Goldsmith, *supra* note 1, at 864; Hans A. Linde, *A New Foreign-Relations Restraint on American States: Zschernig v. Miller*, 28 Z. Ausl. Off. Recht Vokerr. 594, 602-03 (1968).

over this issue.¹⁸³ On the one hand, the Constitution obligates the President to "take Care that the Laws be faithfully executed."¹⁸⁴ If CIL has the status of federal common law, it may be part of the "Laws" covered by this obligation. On the other hand, dicta in *The Paquete Habana* suggests that CIL is not judicially enforceable against the President.¹⁸⁵ And such judicial enforcement would seem to raise special separation-of-powers concerns, since the President needs flexibility in representing the United States on the international plane and plays a central role in articulating the U.S. position concerning the content of CIL.¹⁸⁶

In our prior work, we briefly described this debate and emphasized that the claim that CIL is judicially enforceable against the President, like the other implications of the modern position, depends on the proposition that CIL has the status of federal law.¹⁸⁷ Neuman contends that our discussion of this issue "collapses all relevant distinctions,"¹⁸⁸ apparently because we did not distinguish between low-level and high-level executive officials and among various presidential acts. Some proponents of the modern position have made such distinctions in evaluating the relationship between the Executive and CIL.¹⁸⁹ Such distinctions, however, are relevant only if one accepts the modern position claim that CIL is federal law. If it is not federal law, it is not by itself binding—as a matter of U.S. law—on even low-level executive officials and is not judicially enforceable with respect to any presidential acts. Since we were not advocating the modern position, the distinctions referred to by Neuman were not relevant to our analysis.

Neuman also contends that, by not focusing on these distinctions, we have missed "one of the central difficulties" with our analysis, namely that it "would free not only the President, but also federal officers at every level to commit violations [of CIL]."¹⁹⁰ This conten-

183. See *supra* note 19.

184. U.S. Const. art. II, § 2, cl. 2.

185. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (noting that CIL is judicially enforceable "where there is no treaty, and no controlling executive or legislative act or judicial decision"); see also *id.* at 708 (stating that courts must "give effect to" customary international law "in the absence of any treaty or other public act of their own government in relation to the matter"); see also Restatement (Third), *supra* note 6, § 115, reporters' note 3 (discussing this language).

186. See Restatement (Third), *supra* note 6, § 112 cmt. c; Henkin, *International Law as Law*, *supra* note 14, at 1568-69; Weisburd, *The Executive Branch*, *supra* note 76, at 1253-56. The President also may need flexibility in this area in order to help bring about changes in CIL. See Trimble, *A Revisionist View*, *supra* note 42, at 711-12.

187. See Bradley & Goldsmith, *supra* note 1, at 845-46.

188. Neuman, *supra* note 5, at 381.

189. See, e.g., Jonathan I. Charney, *May the President Violate Customary International Law?: The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 Am. J. Int'l L. 913, 921-22 (1986); Henkin, *The Constitution and United States Sovereignty*, *supra* note 20, at 884.

190. Neuman, *supra* note 5, at 382.

tion overlooks a crucial fact: The conduct of low-level executive officials is already subject to federal control by the President and Congress. The domestic regulatory, statutory, and other limitations on the actions of executive officials undoubtedly reflect, and will continue to reflect, principles of international law.¹⁹¹ The only issue is whether the *judiciary* should have *independent lawmaking authority* to regulate the compliance of executive officials with international law. The judiciary lacks such independent authority with respect to all other areas of executive law compliance, and Neuman has not explained why special judicial power is needed here. Neuman misses this point because he mistakenly assumes that the compliance of executive officials with international law is dependent on federal *judicial* lawmaking.¹⁹²

E. Traditional CIL

As noted above, our critique focused on the new CIL. We did, however, consider the relevance of our thesis for traditional CIL.¹⁹³ Nevertheless, Neuman says our analysis "neglects the effect of denying federal character to the 'old' [CIL]."¹⁹⁴ Neuman appears to be suggesting that it would be unthinkable to deny federal common law

191. Consider, for example, the recently-enacted War Crimes Act, which authorizes the punishment of war crimes if the "person committing such breach or the victim of such breach is a member of the Armed Forces of the United States or a national of the United States." 18 U.S.C. § 2441 (Supp. 1997). Interestingly, even the violation of CIL at issue in *The Paquete Habana*—the seizure of a fishing vessel by a Navy admiral—may not have required independent judicial lawmaking for its correction, given that the President had announced that the military was to comply with international law in the U.S. conflict with Spain. See 175 U.S. 677, 712 (1900); see also Michael J. Glennon, *May the President Violate Customary International Law?: Can the President Do No Wrong?*, 80 Am. J. Int'l L. 923, 923 n.6 (1986) [hereinafter Glennon, *May the President Violate Customary International Law?*] (making this point).

192. Neuman also argues that CIL must be federal law so that judges can use it to regulate their own conduct. See Neuman, *supra* note 5, at 383-85. We are not exactly sure what conduct Neuman has in mind. The only example he provides is the decision by a court whether to give immunity from suit to a consulate, something that, as noted above, is already largely regulated by treaty. Other than immunity from suit, it is not clear what sort of actions by judges themselves would implicate international law. One possibility might be conducting a criminal prosecution against a foreign defendant who has been abducted from another country. The Supreme Court, however, may have already rejected the argument that CIL operates as a restraint on judicial conduct in that situation. See *United States v. Alvarez-Machain*, 504 U.S. 655, 666-70 (1992) (allowing trial against defendant abducted from Mexico); see also *United States v. Alvarez-Machain*, 971 F.2d 310, 311 (9th Cir. 1992), as modified, 1992 U.S. App. LEXIS 28367, *1-*2 (9th Cir. Nov. 3, 1992) (suggesting that the Supreme Court may have foreclosed the CIL argument); *The Supreme Court, 1991 Term; Leading Cases*, 106 Harv. L. Rev. 163, 322-23 (1992) ("[B]y chance or design, the Supreme Court disposed of Alvarez-Machain's potentially viable customary international law defense without analysis.").

193. See Bradley & Goldsmith, *supra* note 1, at 869.

194. Neuman, *supra* note 5, at 372.

status to traditional CIL and that we should therefore have exempted such CIL from our analysis.

The lack of such an exemption in our earlier work was intentional. Our position is that the judicial federalization of *all* CIL requires some authorization from the Constitution or a federal statute. It is important to keep in mind, however, that the authorization requirement has little if any practical significance in connection with traditional CIL. As explained above, the federal political branches appear to have incorporated into federal law most if not all of traditional CIL that is likely to come up in domestic litigation. The debate about CIL's domestic status in the last three decades has almost exclusively concerned new, rather than traditional, CIL. It is significant that Neuman can cite only hypothetical and academic examples of the need for a federal common law of the traditional CIL.¹⁹⁵ Within the real world, gaps either have not appeared in the federal political branches' statutory and treaty incorporations of the traditional CIL or courts have not viewed the traditional CIL as a relevant source of law to fill such gaps.¹⁹⁶ As we noted above, this explains why the traditional CIL has not been much discussed in debates about the modern position. It also suggests that the political branches have, consistent with our view of the way the world should work, done a fairly comprehensive job of incorporating the traditional CIL that matters into federal law. Finally, it suggests that the justification for the modern position should

195. Neuman provides two hypothetical possibilities: the CIL of consular immunity and the purported CIL limits on the extraterritorial application of state law. We know of no decision in recent times that treats either of these CIL norms as a rule of decision or defense in domestic litigation, and Neuman provides none.

196. The reason why the consular immunity problem has not arisen is that, as explained above, most nations of the world have ratified the Vienna Convention of Consular Relations. The reasons for the apparent non-relevance of CIL limits on extraterritorial jurisdiction are more complicated. First, the Permanent Court International Justice famously viewed these limits to be weak in *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). The *Restatement (Third)* adopts a stronger view of these limits, see *Restatement (Third)*, § 403, but, as other commentators have pointed out, the *Restatement (Third)*'s views on this issue may not reflect CIL. See Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 Am. J. Int'l 53 (1995) [hereinafter Trimble, *The Supreme Court and International Law*]. Second, CIL limits on extraterritorial jurisdiction might be weaker than or co-extensive with federal constitutional limits on state extraterritorial jurisdiction. See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397, 343 (1930) (holding that application of Texas law to an insurance contract made in Mexico and governing a Mexican risk violates due process). Third, the Supreme Court has considered numerous challenges in recent years to extraterritorial assertions of state and federal authority without even suggesting that CIL might operate as a rule of decision in this area. See *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. 298, 315 (1994) (upholding California's worldwide unitary tax method claimed by many to violate CIL); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 769 (1993) (upholding extraterritorial application of U.S. antitrust law claimed by many to violate CIL); *United States v. Alvarez Machain*, 504 U.S. 655, 699-700 (1992) (upholding the validity of the President's participation in a foreign abduction which was claimed by many to violate CIL).

not rise or fall on the basis of purely hypothetical situations involving traditional CIL.

Of course, it is conceivable that in domestic litigation a CIL issue might arise that is not plausibly governed by a federal treaty or statute. If this happens, there should be little to fear from a regime that places the responsibility for deciding whether and how to federalize this issue on the federal political branches.¹⁹⁷ This is, after all, the normal presumption of our constitutional order. And, especially in the context of traditional international law, there is absolutely no reason to think the political branches cannot quickly and effectively respond to such a rare circumstance. Not only can Congress quickly respond to such issues, but in the foreign relations context the President has a number of constitutional lawmaking powers and lawmaking powers delegated from Congress that he can employ in emergency situations.¹⁹⁸

197. Neuman says that we "give no serious attention" to the difference between the traditional and the new CIL, and that we "avoid trying to understand the implications" of this hypothetical about CIL limits on state extraterritorial jurisdiction. Neuman, *supra* note 5, at 392. We do not know what more we could do to respond to Neuman's concerns and hypotheticals. We have made clear that the authorization requirement applies to the new and traditional CIL alike; we have stated that this requirement has little relevance to the traditional CIL because of the political branches' comprehensive federalization of these matters; in support of this view we have pointed out that the traditional CIL's domestic legal status has not arisen in any decision in decades; we have specifically responded to his extraterritorial hypothetical by pointing out many examples in which federal courts have not treated CIL limits on extraterritorial jurisdiction as controlling in domestic litigation; we have acknowledged that an issue concerning the traditional CIL could nevertheless conceivably arise in domestic litigation; and we have made clear that we believe the responsibility for federalization of any residual traditional CIL issues that might arise should rest with the political branches, not the federal courts. One might disagree with our analysis, but we do not believe the analysis "evidence[s] no effort to investigate what the consequences of [our] proposal would be for the 'old' customary international law." *Id.* at 392.

198. Perhaps Congress's most sweeping delegation of lawmaking power to the President is the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 (1991). By its terms, this statute is triggered only in the event of "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." *Id.* But this requirement has not in fact substantially limited the scope of the statute, given that presidents "have declared national emergencies with little regard to whether a real emergency has actually existed." Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 Int'l Lawyer 715, 744 n.126 (1992). IEEPA enables the President to respond quickly to suspend or invalidate state law that interferes with or impedes the federal government's ability to conduct foreign affairs. The best known example is the invocation of IEEPA by Presidents Carter and Reagan to lift state-law judicial attachments on Iranian assets and suspend private (state law) claims against Iran as part of a deal to secure release of the hostages in Iran. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

III. THE ALIEN TORT STATUTE AND THE TORTURE VICTIM PROTECTION ACT

In our earlier work, we argued that courts should not apply CIL as federal law unless the federal political branches authorized them to do so. We did not, however, evaluate whether any particular political branch enactments constitute sufficient authorization.¹⁹⁹ This subsidiary issue is particularly relevant to the legal basis for international human rights litigation in U.S. courts. The famous *Filartiga* decision held that the CIL of human rights could be applied by courts even in the absence of any political branch authorization. As we emphasized in our earlier work, however, the requirement of political branch authorization "would not necessarily spell the end for *Filartiga*-type" human rights litigation.²⁰⁰ This is so, we explained, because the authorization requirement might be satisfied by the Alien Tort Statute ("ATS"), or because Congress might incorporate portions of international human rights law into federal law, as it did with respect to torture and extrajudicial killing in the Torture Victim Protection Act of 1991 ("TVPA").²⁰¹

These arguments, if persuasive, are consistent with our thesis that CIL must be grounded in enacted federal law. We analyze these arguments in three steps. We first explain why rejection of the modern position threatens *Filartiga*-type human rights litigation. We then examine whether the ATS authorizes courts to treat CIL as federal law in human rights cases. Finally, we consider the extent to which the TVPA does so. We conclude that there is little reason to think that Congress has federalized international human rights law outside of the TVPA's specific prohibitions on torture and extrajudicial killing. Congress of course retains the prerogative to federalize other human rights norms if it wishes.

A. The Problem

The watershed *Filartiga* decision exemplified a litigation structure that would become typical of its progeny.²⁰² In that case, aliens brought suit in federal court to recover civil damages for acts commit-

199. See Bradley & Goldsmith, *supra* note 1, at 869, 871-73.

200. *Id.* at 872.

201. See *id.* at 872-73.

202. Professor Koh has described *Filartiga* as the "*Brown v. Board of Education*" of "transnational public law litigation." Koh, *supra* note 102, at 2366. The *Filartiga* opinion describes itself as "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). The opinion's author, Judge Kaufman, later wrote that the decision was "the latest development in an unprecedented growth of international concern over the incidence of torture and other human-rights violations," and he observed that "[t]he enunciation of humane norms of behavior by the global community and the articulation of evolved norms of international law by the courts form the ethical foundations for a more enlightened social order." Irving R. Kaufman, A Legal

ted abroad by another alien in alleged violation of customary international human rights law. The statutory basis for federal jurisdiction was the ATS, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁰³ But the necessary Article III basis for the exercise of federal judicial power was uncertain. The parties to the suit were not diverse, and the court did not assume that the case arose under either a treaty or federal statute.²⁰⁴ The court concluded that these circumstances were not fatal to jurisdiction, however, because Article III's "arising under" clause is also satisfied by cases that arise under federal common law.²⁰⁵ Asserting that "the law of nations . . . has always been part of the federal common law," the court held that the plaintiffs' CIL claim arose under federal law for purposes of Article III.²⁰⁶

The court in *Filartiga* thus assumed that the ATS was a pure jurisdictional statute that did not itself incorporate CIL into federal law and whose constitutionality in cases between aliens depended on the existence of an independently-derived federal common law of international human rights law.²⁰⁷ If this reading of the ATS is correct, then a rejection of the view that CIL is automatically federal common law would appear to render human rights litigation under the ATS in *Filartiga*-type cases inconsistent with Article III and thus unconstitutional.²⁰⁸ It does not follow, however, that human rights litigation is necessarily illegitimate, since it is possible that the ATS is more than just a jurisdictional statute, or that the TVPA now provides sufficient authorization for the *Filartiga* holding.

B. *The ATS*

There are basically two ways to interpret the ATS to authorize the federalization of international human rights law.²⁰⁹ The first interpre-

Remedy for International Torture?, *The New York Times*, Sec. 6, p.44, clm. 1 (Nov. 9, 1980).

203. 28 U.S.C. § 1350. The statute was part of the Judiciary Act of 1789, § 9(b), 1 Stat. 73, 77. Between 1789 and 1980, courts had upheld jurisdiction under the ATS in only two cases. See *Adra v. Clift*, 195 F. Supp. 857, 863-65 (D. Md. 1961); *Bolchos v. Darrel*, 3 Cas. 810, 810 (D.S.C. 1795) (No. 1,607). Since *Filartiga*, numerous courts have upheld ATS jurisdiction.

204. See *Filartiga*, 630 F.2d at 887.

205. See *Illinois v. Milwaukee*, 406 U.S. 91, 99-100 (1972).

206. *Filartiga*, 630 F.2d at 885.

207. See *id.* at 887 (construing ATS "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law").

208. See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 468 (1989) [hereinafter Burley, *The Alien Tort Statute*].

209. A third way is to view the ATS in alien-alien cases as an example of "protective jurisdiction." See Russell J. Weintraub, *Establishing Incredible Events by Credible Evidence: Civil Suits for Atrocities that Violate International Law*, 62 Brook. L. Rev.

tation would be that the ATS itself establishes a substantive federal cause of action for violations of CIL. This would mean that a claim brought pursuant to the ATS would "arise under" the ATS rather than, as *Filartiga* concluded, under the federal common law of CIL. Several courts have read the ATS to create a cause of action in this fashion, although they have not tied this holding to the issue of the ATS's constitutionality under Article III.²¹⁰

The second interpretation views the ATS's jurisdictional grant not to create a cause of action itself, but rather to authorize federal courts to do so. On this view, ATS cases would arise under this congressionally-authorized federal common law for purposes of Article III. The obvious analogy here is the Supreme Court's decision in *Lincoln Mills*, which implied federal common lawmaking powers from the Taft-Hartley Act's grant of federal jurisdiction to decide disputes under certain labor-management contracts.²¹¹ At least one federal court, citing *Lincoln Mills*, appears to have adopted this reading of the ATS.²¹²

Can the ATS plausibly be read to convert CIL into substantive federal law under either of these interpretations? As Professor Slaughter (formerly Burley) has correctly noted, "definitive proof of the intended purpose and scope of the [ATS] is impossible."²¹³ Nonetheless, the ATS's text, drafting history, and historical context may render some constructions of the statute more plausible than others. Although these sources do not provide a complete picture of what the ATS was designed to do, they do provide powerful reasons to rule out both the federal cause of action and *Lincoln Mills* interpretations outlined above.

The ATS was enacted by the First Congress as part of the Judiciary Act of 1789. Its original language provided that federal district courts "shall also have *cognizance* . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."²¹⁴ As Professor Casto has noted, "cognizance" was a term of

753 (1996). The theory of protective jurisdiction, which has never been accepted by the Supreme Court, would allow Congress to create federal court jurisdiction for non-federal claims where "necessary to protect important federal interests." Chemerinsky, *supra* note 110, § 5.2.2, at 260. Goodman and Jinks dismiss protective jurisdiction as an implausible rationale for international human rights litigation under the ATS. See Goodman & Jinks, *supra* note 5, at 478-79 n.89. We tend to agree. See Bradley & Goldsmith, *supra* note 1, at 873 n.354.

210. See *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1474-75 (9th Cir. 1993); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995).

211. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

212. *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996).

213. Burley, *The Alien Tort Statute*, *supra* note 208, at 463; see also *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (The ATS "is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came.").

214. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73.

art "referring to a court's power to try a case."²¹⁵ Casto also notes that the First Congress used "entirely different language" when it created statutory civil actions.²¹⁶ This jurisdictional reading of the ATS is confirmed by the current codification of the statute, which extends "original *jurisdiction*" over certain cases brought by aliens.²¹⁷ In sum, the language of the ATS makes it highly unlikely that the drafters envisioned it as creating federal substantive rights.

It is equally unlikely that the drafters of the ATS envisioned the statute as authorizing *Lincoln Mills*-type federal common law making. The First Congress lacked our positivist and realist conceptions of common law.²¹⁸ In ATS cases, as in other contexts, they would have envisioned federal courts as applying a pre-existing, non-federal general common law, which included the law of nations.²¹⁹ In this milieu, congressional authorization of *Lincoln Mills*-type federal common law was unnecessary and, indeed, probably unthinkable.²²⁰

There is thus little reason to think that the ATS as originally written incorporated CIL into federal law under either the federal cause of action or the *Lincoln Mills* theory. An additional, independent difficulty with viewing the ATS as a basis for modern human rights litigation concerns the dramatic differences between CIL when the statute was written and as understood today. In 1789, the law of nations did not purport to regulate the treatment of individuals by their own governments. As Professor Slaughter correctly notes, "18th-century international lawyers simply could not have imagined that the law of nations would impose a positive obligation on a government with respect to its own citizens."²²¹ The principal individual offenses against the law of nations at the time the ATS was enacted were violations of safe conduct, infringement of the rights of ambassadors, and piracy.²²² Modern human rights litigation under the ATS, by contrast, primarily concerns the way a foreign nation treats its citizens. In this light, the pertinent question is the level of generality at which the ATS should be interpreted: Does it authorize civil suits for law of nations violations in general, without regard to the changing content of the law of

215. Casto, *supra* note 156, at 479.

216. *See id.*

217. 28 U.S.C. § 1350.

218. *See* Jay, *The Origins*, *supra* note 24, at 1309-10.

219. *See* Casto, *supra* note 156, at 480; William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l Comp. L. Rev. 221, 232-34 (1996); Jay, *The Status of the Law of Nations*, *supra* note 11, at 822-23.

220. *See* Dodge, *supra* note 219, at 234, 240.

221. Burley, *The Alien Tort Statute*, *supra* note 208, at 479 n.83.

222. *See* 4 William Blackstone, Commentaries 68 (1783).

nations, or does it authorize civil suits for what was understood in 1789 to be the sorts of things regulated by the law of nations?²²³

Many federal courts have interpreted the ATS as authorizing suits for violations of the new CIL that has developed since World War II.²²⁴ This view of the ATS "creates a great potential for expanding the reach of international law in U.S. courts."²²⁵ Three factors, however, cut against this reading. First, *Erie's* repudiation of the general common law background against which the ATS was enacted means that the progressive reading of the ATS would not only extend jurisdiction to completely different types of international law claims, but it would also read the ATS, in contrast to its original design, to apply this new CIL of human rights as *federal law*. As a result, the progressive reading of the ATS has potentially profound collateral implications for state law, federal question jurisdiction, and possibly the legality of presidential actions that go far beyond anything that could have been contemplated by the First Congress.

Second, there is general agreement that a significant purpose of the ATS was to ensure that the United States complied with its obligations under international law by providing redress for certain violations of the law of nations. More specifically, a major impetus for the ATS was unredressed attacks on ambassadors in the United States during the Articles of Confederation period that implicated the U.S. responsibility under international law.²²⁶ In this light, it appears that the ATS was designed to give foreign governmental officials the *protection* of CIL as part of a larger effort by the United States to avoid foreign relations controversies. This original purpose of the ATS contrasts sharply with its modern usage. The United States has no general duty under international law to provide civil remedies in its courts for human rights violations committed abroad by foreign government officials against aliens.²²⁷ Moreover, the modern ATS uses CIL not as

223. One could accept the idea that the drafters meant to allow for changes in the specific content of the law of nations, without accepting the idea that the ATS was intended to cover the structurally very different new CIL. As Judge Bork observed:

It is one thing for a case like *The Paquete Habana* to find that a rule has evolved so that the United States may not seize coastal fishing boats of a nation with which we are at war. It is another thing entirely, a difference in degree so enormous as to be a difference in kind, to find that a rule has evolved against torture by government so that our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens.

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring).

224. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

225. *Stephens & Ratner, International Human Rights Litigation*, *supra* note 156, at 53.

226. See *Casto*, *supra* note 156, at 489-94; *Dodge*, *supra* note 219, at 226-30.

227. As Professor Slaughter has noted, "[s]trictly speaking, the duty of the United States at international law extends no further than to refrain from violating the

a shield to protect foreign governmental officials from torts committed in the United States, but rather as a sword to hold them civilly liable for tortious acts that took place abroad. And, whatever else the ATS may accomplish, it does not, in most instances anyway, promote amicable inter-national relations.

The third difference concerns the extraterritorial use of the ATS. Recall that under current practice, federal courts exercising jurisdiction under the ATS create causes of action and remedies as a matter of United States federal law to govern the activities of foreign government officials on foreign soil. Such extraterritorial regulation would have been unthinkable in the eighteenth century, a time when each nation's regulatory power was limited to conduct either within the nation's territory or by the nation's citizens.²²⁸ The specific historical context in which the ATS was enacted further suggests that its scope was limited to acts that took place in or at least had some nexus to the United States. As Judge Edwards explained in *Tel-Oren*, "the focus of attention . . . was on actions occurring within the territory of the United States, or perpetrated by a U.S. citizen, against an alien."²²⁹ Modern ATS cases, by contrast, involve the application of U.S. causes of action and remedies to extraterritorial acts that have no nexus whatsoever to the United States. This broad extraterritorial scope would have been inconceivable in 1789.²³⁰ It also runs afoul of the

human rights of its own citizens." Burley, *The Alien Tort Statute*, *supra* note 208, at 492.

228. See Born, *supra* note 97, at 493-97, 549-50.

229. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards J., concurring).

230. Consistent with prevailing notions of territorialism, Oliver Ellsworth, the principal drafter of the ATS, believed "that the United States lacked legislative jurisdiction over transactions in foreign countries." Casto, *supra* note 156, at 485-86 n.97 (citing Letter from Chief Justice Ellsworth to Jonathan Trumbull (March 13, 1796) (George Washington Papers, Library of Congress)). Some commentators and judges claim that extraterritorial jurisdiction was recognized in 1789 for certain egregious violations of international law, pursuant to the international law doctrine of *hostis humani generis*. See, e.g., Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 Harv. J. Int'l L. 53, 60-62 (1981); *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring). No ATS case before 1980 considered the doctrine of *hostis humani generis*, but some nineteenth century courts did apply the doctrine to the acts of pirates and, in some instances, slave traders. The scope of this doctrine was uncertain. In *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), the Court construed a federal piracy statute, which on its face extended to "any person" who committed piracy on the high seas, not to apply to persons "who [were] not citizens of the United States, nor sailing under their flag, nor offending particularly against them." *Id.* at 630-35. In *United States v. Klintonck*, 18 U.S. (5 Wheat.) 144, 151-52 (1820), the Court applied the same statute to piracy on the high seas committed by a U.S. citizen, while suggesting that no jurisdictional nexus with the United States was necessary when the pirate "acknowledg[ed] obedience to no government whatever." Even there, the Court made clear that the statute did not apply to extraterritorial acts of persons "under the acknowledged authority of a foreign [s]tate" committed against non-U.S. citizens. *Id.* at 152; see also *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 192-96

reinvigorated presumption in U.S. law against the extraterritorial application of federal statutes.²³¹ This presumption is designed at least in part to ensure that the political branches rather than courts make decisions about extraterritorial scope that might adversely implicate U.S. foreign relations interests.²³² In recent years, the Court has invoked the presumption in numerous contexts to limit the extraterritorial scope of statutes that contain far stronger suggestions of extraterritorial intent than the ATS.²³³ It makes particular sense to apply this presumption in the context of the ATS—a statute that is

(1820) (reaffirming that the same statute extends to piracy on the high seas by a crew “whose conduct is such as to set at nought the idea of . . . acting under allegiance to any [foreign] power,” while at the same time making clear that a murder on the high seas by one non-citizen against another did not fall within the statute). Whatever status the nineteenth century doctrine of *hostis humani generis* may have as a precursor to modern international human rights law and universal jurisdiction, it cannot be invoked as a basis to construe the original understanding of the ATS to extend to the acts of a foreign sovereign and its agents committed on foreign soil in violation of CIL. In addition to all of the independent evidence that the ATS had a different scope, the notion of applying CIL to acts on foreign soil under color of law would have been unthinkable. Consider what Justice Story, a judge otherwise supportive of natural law claims and broad judicial power, said during this period in a related context:

No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the *custos morum* of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

United States v. La Juenie Eugenie, 26 F. Cas. 832, 847 (D. Mass. 1822).

231. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993); *Smith v. United States*, 507 U.S. 197, 204 (1993); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-41 (1989).

232. See Bradley, *Territorial Intellectual Property Rights*, *supra* note 112, at 140-53.

233. The extraterritoriality decision with the closest connection to the ATS is *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989). At issue there was the extraterritorial scope of the Foreign Sovereign Immunities Act (FSIA), which establishes the grounds for jurisdiction in suits against foreign sovereigns. After holding that the ATS could not be a basis for federal jurisdiction against foreign sovereigns because the FSIA was the exclusive basis for such suits, *id.* at 433-38, the Court turned to the scope of jurisdiction under the FSIA. Despite ambiguous statutory definitions suggesting that FSIA jurisdiction might extend to a tort by a foreign sovereign on the high seas, the Court applied the presumption to hold that the FSIA did not extend so far. See *id.* at 440 (invoking “[t]he canon of construction which teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” (citation omitted)); *id.* (“When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of the statute.”). This logic applies with even greater force to the ATS, which contains *no hint* of extraterritorial scope, and which, unlike the FSIA, was drafted in a milieu in which rigid territorialism was much more pervasive.

silent about its extraterritorial scope, that lay largely fallow for nearly 200 years, and that, in contrast to anything imaginable when it was enacted, is being invoked as a vehicle to regulate the way that foreign governments treat foreign citizens on foreign soil.

In sum, dramatically changed circumstances between 1789 and 1980, when combined with (a) the ATS's textual suggestion that it concerns only jurisdiction, (b) the implausibility of a cause of action or *Lincoln Mills* interpretation of the ATS as an original matter, and (c) the fact that the ATS lay practically dormant for nearly 200 years, lead us to the conclusion that the ATS cannot support the modern practice.

C. *The TVPA*

Goodman and Jinks argue that, regardless of the best reading of the ATS or of the original validity of *Filartiga*, the TVPA provides "specific evidence of congressional authorization of the *Filartiga* doctrine."²³⁴ Unfortunately for their argument, this specific evidence consists almost exclusively of snippets of legislative history—language in House and Senate Reports, and statements by the Act's sponsors.²³⁵ Moreover, this legislative history is more ambiguous about its approval of *Filartiga* than Goodman and Jinks suggest. And, most importantly, to the extent that the legislative history did approve of *Filartiga*, this approval is inconsistent with actual federal enactments—including the TVPA itself—that indicate that Congress rejects *Filartiga*'s open-ended incorporation of CIL into federal law.

As Goodman and Jinks suggest, a proximate cause of the TVPA was Judge Bork's opinion in *Tel-Oren*.²³⁶ In *Tel-Oren*, aliens accused Libya, the PLO, and others of violating CIL prohibitions on torture and summary execution in connection with an armed attack in Israel in 1978. Bork's opinion rejected the *Filartiga* framework and argued instead that jurisdiction under the ATS depended on the existence of a cause of action under a federal statute, treaty, or CIL. He found no such cause of action under any of these sources. Moreover, in order "to avoid potential interference with the political branches' conduct of foreign relations," he declined to infer one.²³⁷ Instead, he argued, the court should wait for "affirmative action by Congress" before apply-

234. Goodman & Jinks, *supra* note 5, at 514.

235. They also cite to *amicus curiae* briefs written by law professors. See *id.*, *supra* note 5, at 527.

236. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring). There was no opinion of the court in *Tel-Oren*. All three judges on the D.C. Circuit panel rejected the plaintiffs' claim under the ATS, albeit for different reasons. See *id.* at 775 (Edwards, J., concurring); *id.* at 823 (Robb, J., concurring). But Judge Bork's opinion received the most notoriety. See, e.g., Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 Am. J. Int'l L. 92 (1985).

237. *Tel-Oren*, 726 F.2d at 799.

ing the 1789 ATS to modern human rights litigation that the drafters of the Act could not have contemplated.²³⁸

Congress provided this affirmative action in the TVPA.²³⁹ But far from ratifying the wholesale incorporation of CIL assumed by *Filar-tiga*, it created a federal cause of action *only* for torture and extra-

238. *Id.* at 801 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971)); *see also id.* at 801-05.

239. The Torture Victim Protection Act of 1991 in its entirety provides:

Section 1. Short Title

This Act may be cited as the "Torture Victim Protection Act of 1991."

Section 2. Establishment of Civil Action

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations.—No action shall be maintained under the provisions of this section unless it is commenced within 10 years of the time after the cause of action arose.

Section 3. Definitions

(a) Extrajudicial Killing.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on a discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Torture Victim Protection Act of 1991, Pub. L. No. 102-25, 106 Stat. 73 (1992).

judicial killing.²⁴⁰ Consistent with this textual limitation, the House and Senate Reports both emphasize the high degree of international consensus concerning the illegality of torture and extrajudicial killing, and they both state that “[t]he purpose of [the TVPA] is to provide a Federal cause of action against any individual who, under actual or apparent authority or under color of any foreign nation, subjects any individual to torture or extrajudicial killing.”²⁴¹

The TVPA’s relatively narrow incorporation of international human rights law into federal law differs from the *Filartiga* approach in several respects. It limits the scope of the federal prohibition to acts done under color of foreign law.²⁴² It defines the new federal causes of action with a careful precision that contrasts with the vague contours of analogous CIL prohibitions.²⁴³ It includes an exhaustion requirement that was designed to avoid unnecessary interference with foreign nations and undue burden on U.S. courts.²⁴⁴ And it provides a statute of limitations designed to avoid stale claims.²⁴⁵ In these respects and others, the TVPA serves precisely the purpose sought by Bork’s opinion. It establishes a democratic foundation for the application by U.S. courts of international law prohibitions on torture and extrajudicial killing; it rectifies many of the substantive ambiguities of the *Filartiga* approach to these international law prohibitions; and it adds substantive and procedural limitations that balance the need to promote two human rights norms with the countervailing concerns of foreign relations and the burdened federal judiciary.²⁴⁶

240. 28 U.S.C. § 1350 note, §§ 2(a), 3.

241. S. Rep. No. 102-249, at 3 (1991) (emphasis added); H. Rep. No. 102-367, at 2 (1991) (emphasis added).

242. 28 U.S.C. § 1350 note, § 2(a). Also unlike the *Filartiga* approach, the TVPA permits U.S. citizens to sue for recovery. *Id.*

243. The TVPA’s definitions of torture and extrajudicial killing are narrower than those definitions under CIL and the Torture Convention. They track the definitions adopted by the Senate’s Understanding of the requirements of the Torture Convention, which was a condition to the Senate’s consent to ratification of the treaty.

244. 28 U.S.C. § 1350 note, § 2(b); see also H. Rep. No. 102-367, at 87 (1991) (stating that the exhaustion requirement “ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred” and avoids “exposing U.S. courts to unnecessary burdens”).

245. 28 U.S.C. § 1350 note, § 2(c); see also H. Rep. No. 102-367, at 88 (1991) (the statute of limitations requirement “ensures that the federal courts will not have to hear stale claims”).

246. Despite these limitations, President Bush expressed the following concerns upon signing the legislation:

This legislation concerns acts of torture and extrajudicial killing committed overseas by foreign individuals. With rare exceptions, the victims of these acts will be foreign citizens. There is thus a danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery.

Such potential abuse of this statute undoubtedly would give rise to serious frictions in international relations and would also be a waste of our own limited and already overburdened judicial resources.

On its face, the TVPA appears to reject rather than embrace the open-ended *Filartiga* approach to the judicial incorporation of CIL into federal law. The TVPA's text does not remotely suggest an implicit embrace of the *Filartiga* approach. If Congress had chosen to federalize all CIL human rights prohibitions, it would have needed to enact a significantly different, and broader, statute. Instead, in its first consideration since 1789 of the meaning and scope of the ATS, Congress in the TVPA federalized *only* prohibitions on torture and extrajudicial killing. Moreover, the TVPA appears in fact to *limit* the *Filartiga* approach with respect to these two central and important international law prohibitions. Otherwise, one could bring torture and extrajudicial killing claims under the *Filartiga* rationale without the need to satisfy the TVPA's definitional, statute of limitations, and exhaustion requirements, thereby rendering the TVPA's careful substantive and procedural compromises a nullity. In this light, it makes no sense whatsoever to read the TVPA as implicitly federalizing, without procedural or substantive limitation, other CIL human rights norms, most of which are much less settled and central than torture and extrajudicial killing.

This conclusion that the TVPA federalizes only two and not a host of CIL norms is confirmed by other political branch enactments both before and after the TVPA. These enactments indicate, contrary to *Filartiga*'s wholesale incorporation of CIL into federal law, that the political branches are very stingy and selective in their incorporation of international human rights norms into domestic federal law. Consider, for example, the Torture Convention.²⁴⁷ The Senate consented to ratification of the Convention in October, 1990, in the midst of deliberation about the TVPA but 18 months before its enactment. At the recommendation of President Bush, the Senate attached a number of conditions to its consent that reveal an unambiguous desire to ensure that the Convention has *no effect* on contrary domestic law absent subsequent federal legislation.²⁴⁸ When Congress enacted this subsequent legislation in the TVPA, it adopted the Senate's definition of torture and extrajudicial killing, which were narrower than CIL.

Statement by President George Bush Upon Signing H.R. 2092, 28 Weekly Compilation of Presidential Documents 465, March 16, 1992, *reprinted in* 1992 U.S.C.C.A.N. 91.

247. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. 100-20 (1988), 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985).

248. Most significantly, the Senate insisted that the substantive provisions of the Torture Convention, Articles 1-16, were "not self-executing." See Committee on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-30, at 31. This means that the Torture Convention does not apply as domestic federal law in the absence of implementing legislation by Congress. The Senate also imposed various reservations and understandings that together ensure that the Convention does not trump otherwise inconsistent federal and state law. See *id.* at 29-30.

The Torture Convention and the TVPA reflect a broader and unambiguous pattern of political branch resistance to open-ended incorporation of international human rights norms that might interfere with domestic state and federal law. The numerous reservations, understandings, and declarations attached to the Torture Convention were replicated in the Senate's consent to the Convention on the Elimination of All Forms of Discrimination, and the Covenant on Civil and Political Rights.²⁴⁹ The same pattern can be seen in statutes that selectively incorporate international human rights norms into federal law. The 1987 Genocide Convention Implementation Act, for example, made genocide a federal crime.²⁵⁰ It carefully limited this crime, however, to acts committed within the United States or by U.S. nationals, and it specified that the federal crime did not preclude "application of State or local laws" to the same conduct and did not "creat[e] any substantive or procedural right enforceable by law by any party in any proceeding."²⁵¹ None of these narrow, selective, and carefully-defined incorporations of human rights law into federal law make any sense if Congress in the TVPA had actually approved of *Filartiga's* wholesale incorporation of the CIL of human rights into federal law.

This is the background against which the legislative history of the TVPA must be read. This legislative history does approve of *Filartiga* in places. But even this approval is ambiguous. It does not make clear, for example, whether it approves of *Filartiga's* wholesale incorporation of CIL into federal law, which would bind the states and perhaps the President, or rather whether it merely approves of the judicial incorporation of the CIL of human rights as applied to foreign governmental acts. Nor does it say anything about whether the substantive and procedural limitations of the TVPA apply to ATS cases. Whatever its meaning, there is a good reason why this approval of *Filartiga* is in the legislative history rather than the text of the TVPA. The TVPA was approved by Congress only after years of debate, compromise, and precise drafting that limited the original bill's scope in several respects.²⁵² It is extremely unlikely that the members of Congress who demanded these changes and ultimately voted for the TVPA would have assented to the much broader, open-ended, and undefined *Filartiga* approach, which includes many more CIL prohibi-

249. See Henkin, *U.S. Ratification*, *supra* note 51, at 342-44.

250. 18 U.S.C. §§ 1091-92 (Supp. 1997).

251. *Id.*, §§ 1091(d), 1092.

252. The TVPA was first introduced in 1986 and finally enacted in 1991. During this period, the sponsors of the bill added (among other things) an exhaustion requirement, a statute of limitations, and a narrower definition of torture in order to accommodate the concerns of numerous members of Congress. See 138 Cong. Rec. S2667 (daily ed. March 3, 1992) (statement of Senator Grassley); 137 Cong. Rec. S1378 (daily ed. Jan. 31, 1991) (statement of Senator Specter); 137 Cong. Rec. H11244-04 (daily ed. Nov. 25, 1991) (statement of Congressman Mazzoli).

tions than the TVPA, contains no procedural limitations, and might trump state law. This fact, combined with the ambiguities in the legislative history and the countervailing indications of other congressional enactments, suggests that the TVPA should not be read as implicitly ratifying *Filartiga*.

At the end of the day, the weight to be given to the TVPA's legislative history will depend on one's view regarding the appropriate sources of statutory interpretation. We have tried to present reasons why even someone who thinks that legislative history is a significant source of statutory meaning might not view this aspect of the TVPA's legislative history as reflecting federal law. If Congress really does support the *Filartiga* logic as strongly as Goodman and Jinks believe, there is nothing to fear from a requirement that Congress express this approval in a statute rather than in ambiguous legislative history. It is much more likely, however, that Congress will continue to incorporate CIL on a very selective basis with numerous procedural limitations and without preempting inconsistent state law.

CONCLUSION

Some might think that our arguments reflect hostility towards human rights or international law. This is not our view. The growing international recognition that a government cannot, under the guise of sovereignty, violate the basic individual rights of its citizens is one of the most positive moral and legal developments in the post-World War II period. The human rights revolution does not exist, however, in a legal vacuum on the international or the domestic plane. Legal structures can reflect the human rights revolution in a number of ways, and some are more effective and legitimate than others. Domestic constitutionalism has been the primary vehicle for recognition and enforcement of human rights in this country. European nations and other countries have begun to achieve similar ends through the interaction of domestic constitutionalism and international organizations constituted and governed by treaty.

CIL presents a third legal mechanism for the recognition of international human rights. But the new CIL of human rights raises serious questions not raised by other methods for enforcing international human rights. On the international plane, there is no clear conception regarding how this new CIL is made or identified, and there is even more uncertainty regarding how it fits into the traditional structures of international law. This article has focused on the different question of how the new CIL fits into the domestic constitutional structure of the United States. CIL's domestic legal status has significance in the enforcement of human rights in this country, because the federal political branches have largely conditioned ratification of international human rights treaties on their non-enforceability as domestic law. Our prior work argued that the modern position view that the new

CIL is automatically incorporated into federal common law is inconsistent with fundamental constitutional values. In this Article, we have further argued that, with minor exceptions, current federal statutes do not support incorporation of substantive rules of the new CIL of human rights.

In the United States, international law has long suffered from doubts of legitimacy—in the academy, in policy circles, and in the popular mind. One reason for these doubts is that international law is viewed as something alien to our political and legal traditions. Another reason is that international lawyers often confound law and aspiration. We believe that the current structure of international human rights litigation in U.S. courts only increases these doubts. And this, in turn, raises the question of whether the current system helps or hinders the ultimate enforceability of international human rights law. Our hope is that by highlighting the difficulties of the modern position, we might actually contribute to placing international law generally and international human rights law specifically on a more secure constitutional foundation.

Notes & Observations